Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Petitioner,

vs.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
Attorneys for Petitioner
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281

71465

(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

Lutz Appellate Services, inc.

QUESTIONS PRESENTED

I. Whether this case should be remanded to the Court of Appeals for reconsideration in light of:

(a) this Court's recent decision in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 117 S.Ct. 1590 (1997); and/or

(b) HUD's recent Statement of Policy 1997-1, which construes the preemptive scope of 42 U.S.C. § 5403(d).

II. Whether lack of intent to violate federal and constitutional law excuses:

(a) a municipal regulation that has the practical effect of encroaching upon an area of law reserved exclusively by Congress; and/or

(b) a municipal regulation that has the practical effect of discriminating against interstate commerce in favor of intrastate commerce.

III. Whether a Dormant Commerce Clause claim can be disposed adversely by summary judgment where the challenger demonstrates a burden on interstate commerce and submits evidence of less burdensome alternatives to achieve the state's putative purpose.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner Texas Manufactured Housing Association, Inc. ("TMHA") has a single wholly-owned subsidiary named TMHA Services, Inc., which is a for-profit corporation organized under the laws of the State of Texas, engaged principally in the sale of publications and forms for the use of businesses involved in the manufactured housing industry. With the exception of TMHA Services, Inc., TMHA has no parent and no other subsidiaries or affiliates.

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The unreported opinion of the Court of Appeals is reproduced in the Appendix filed herewith ("App.") at 3a. The unreported opinions of the district court are reproduced in the Appendix at 6a and 33a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 10, 1997. On April 24, 1997, Petitioner filed its Petition for Rehearing, which was denied by the Court of Appeals on May 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.*, is set forth below:

> **5403(d) Supremacy of Federal standards**
>
> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

STATEMENT OF THE CASE

In 1993, Janet Stevenson[1] filed an application with the City of La Porte, Texas, to place a new "HUD-code manufactured home" on her property. The home was to replace a similar home which had been destroyed by fire. For sake of clarity, a "HUD-code manufactured home" is the modern-day counterpart of what was once known as a "mobile home." Since June 15, 1976, manufactured homes have been required to meet preemptive federal construction and safety standards promulgated by the United States Department of Housing and Urban Development. *See* 42 U.S.C. § 5403. In contrast, a "mobile home" is defined under Texas law as having been built before the onset of federal regulation. *See, e.g.*, Tex. Rev. Civ. Stat. Ann. art. 5221f, § 3(1) (Vernon Supp. 1997). The City denied Ms. Stevenson's request by citing Ordinance 1501, its comprehensive zoning ordinance. Under Ordinance 1501, HUD-code manufactured homes are not permitted in the City's R-1 residential districts (Ms. Stevenson's property was located in such a district). Importantly, the City informed Ms. Stevenson that one of her "options" was to replace her fire-damaged home with a "modular" home.[2] Modular homes

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1. Ms. Stevenson, formerly a plaintiff in this lawsuit, is no longer a party. In January 1996, she settled her claims at mediation.

2. Letter from Mark S. Lewis, Chief Building Official, to Janet A. Stevenson, dated October 6, 1993 (Exh. 1 to Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment). Lewis described a modular home as a "type of manufactured home." *Id.* Like a HUD-code manufactured home, a "modular" home is a species of factory-built housing. A modular home and a similarly equipped HUD-code manufactured home look virtually identical in terms of their outward visual characteristics, and they serve the same purposes (*i.e.*, single-family residential housing). This was the affidavit testimony of Will Ehrle, TMHA's President and General Counsel (Exh. E to TMHA's Response in Opposition to La Porte's Motion

(Cont'd)

are permitted in the City's R-1 residential districts. Ms. Stevenson appealed the decision to the City's Zoning Board of Adjustment, to no avail.

In 1994, Ms. Stevenson, joined and supported by the Texas Manufactured Housing Association, Inc. ("TMHA"), the statewide trade association which represents the manufactured housing industry in Texas, filed a complaint in the United States District Court for the Southern District of Texas. The complaint alleged that Ordinance 1501 is preempted by federal law, namely, the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.* (NMHCSSA). The complaint also challenged the constitutionality of Ordinance 1501 under the Dormant Commerce Clause. Subject matter jurisdiction over all these claims was proper under 28 U.S.C. § 1331.

District Judge Nancy Atlas dismissed the entire case by granting the City's motion for summary judgment. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. In a terse, two-page per curiam opinion, the Fifth Circuit based its holding on circuit precedent, namely *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, __ S.Ct. __ (1997). Although the *Nederland* case involved a different ordinance and a considerably different factual record, the Fifth Circuit was

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(Cont'd)
for Summary Judgment). The difference lies in the construction standards to which each is built. Since 1976, all manufactured housing in the United States is built to the HUD code. *See* 42 U.S.C. § 5403. In contrast, modular housing is regulated at the state level. In Texas, modular housing is built to the Texas modular building code, a code which is itself an amalgamation of various standardized building codes which are locally applied to "site-built" residential construction. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f-1 (Vernon 1987 & Supp. 1997); 16 Tex. Admin. Code § 70.100 (West 1996).

not persuaded that the factual distinctions raised a genuine issue of material fact sufficient to preclude summary judgment (App. B, 5a).

One month after the Fifth Circuit's decision, HUD published its Statement of Policy 1997-1. 62 Fed. Reg. 24337 (May 5, 1997) (App. E, 65a). For the first time, HUD announced explicit guidelines for deciding whether zoning practices that exclude manufactured housing while simultaneously allowing other forms of factory-built housing violate 42 U.S.C. § 5403(d).

Five weeks after the Fifth Circuit's decision, this Court handed down its opinion in *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 117 S.Ct. 1590 (1997). Importantly, *Camps* compels trial courts to examine *any* incidence of discrimination against interstate commerce, however slight.

REASONS FOR GRANTING THE WRIT

This Court should grant the writ, vacate the judgment, and remand to the Fifth Circuit ("GVR") for reconsideration in light of two recent developments: (1) this Court's recent decision in *Camps*, 117 S.Ct. 1590, and (2) HUD's Statement of Policy, released May 5, 1997. The Fifth Circuit did not have the benefit of either of these two developments when it decided both this case and the *Nederland* case.

This Court should grant the writ to resolve a conflict with the Eleventh Circuit's decision in *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988). A resolution of the conflict calls for this Court to determine whether lack of intent to violate federal law excuses a municipal regulation that has the practical effect of encroaching upon an area of law reserved exclusively by Congress. Another reason for granting the writ is for this Court to determine whether lack of protectionist intent excuses a municipal regulation that has the practical effect of

discriminating against interstate commerce in favor of intrastate commerce. In this case, the City of La Porte argues that it should be exempt from liability because it was engaged in the exercise of its police power.

Yet another reason for granting the writ is for this Court to establish a uniform rule for determining the circumstances under which the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), can be applied at the summary judgment level.

I.

THIS CASE SHOULD BE REMANDED TO THE COURT OF APPEALS FOR RECONSIDERATION IN LIGHT OF THIS COURT'S RECENT DECISION IN *CAMPS NEWFOUND/OWATONNA, INC. v. TOWN OF HARRISON, ME.*, 117 S.Ct. 1590 (1997).

This Court should issue a GVR order so that this case can be reconsidered in light of *Camps*, 117 S.Ct. 1590. District Judge Atlas gave little credence to TMHA's Dormant Commerce Clause claim, apparently because of a concern for the size of the markets involved. She openly questioned whether there is an "identifiable and statistically significant impact on interstate commerce resulting from the prohibition of manufactured homes from a segment of a single city, La Porte" (App. C, 22a). Constitutionality, however, is not measured by the quantitative impact on the national economy, a point which resonates throughout the *Camps* opinion. *See Camps*, 117 S.Ct. at 1608 ("even the smallest scale discrimination can interfere with the project of our federal Union"). There is simply no *de minimis* defense to discrimination which favors intrastate commerce over interstate commerce.

Camps was handed down after the Fifth Circuit rendered its decision in this case (April 10, 1997). *Camps* compels close analysis of *any* incidence of discrimination, however slight, and the opinion removes evidentiary obstacles which were erected in this case by both the district court and the Fifth Circuit.[3] With *Camps* as a guidepost, there is a reasonable probability that, upon further consideration, the Fifth Circuit would find a violation of the Dormant Commerce Clause. Under these circumstances, it would be appropriate for this Court to grant the writ, vacate the judgment, and remand the case to the Fifth Circuit for reconsideration in light of *Camps*. *See Lords Landing Village Condominium Council of Unit Owners vs. Continental Insurance Co.*, 117 S.Ct. 1731, 1732 (1997).

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3. In *Camps*, this Court emphasized that the aggrieved party is not required to show that any one particular person actually changed his or her position "as a result of the burden imposed" on interstate commerce. *See Camps*, 117 S.Ct. at 1600 n.15. Such a requirement "misconstrues the proper analysis." *Id.* This undoubtedly would have changed the result in *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, __ S.Ct. __ (1997), where TMHA argued that, because a person *could* place a modular home on his or her own property, Nederland's ban on HUD-code manufactured housing confers benefits on the Texas modular housing industry, an intrastate industry. Because TMHA did not demonstrate that these types of purchasing decisions were actually being made by Nederland residents, the Fifth Circuit held that "Plaintiffs have not demonstrated that whatever mode of housing is built in lieu of HUD-code manufactured homes, it will be provided by in-state suppliers." *Id.* at 1104. Under *Camps*, TMHA is not required to show that one or more La Porte residents have actually purchased modular housing in lieu of HUD-code manufactured housing.

Notably, La Porte's own officials acknowledge that modular housing (1) is a substitute for HUD-code manufactured housing; and (2) has, in fact, been placed at various locations in the City (Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment).

II.

THIS COURT SHOULD REMAND THIS CASE TO THE COURT OF APPEALS FOR RECONSIDERATION IN LIGHT OF HUD'S STATEMENT OF POLICY 1997-1, RELEASED MAY 5, 1997.

On May 5, 1997, after the Fifth Circuit decided this case, HUD published its Statement of Policy 1997-1. *See* 62 Fed. Reg. 24337 (1997) (App. E, 65a).[4] Its Statement of Policy represents HUD's first attempt to articulate the types of zoning practices that violate 42 U.S.C. § 5403(d).[5] HUD began its analysis by noting that state and local governments were "imposing more limitations on the placement of manufactured homes that are built to the Federal manufactured home construction and safety standards . . . than on other types of factory-built single family housing." 62 Fed. Reg. 24337 (App. E, 67a). HUD declared that "a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards." *Id.* at 24338 (App. E, 70a). According to HUD, "such a system of local regulation and

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4. HUD's goal is to expand the use of manufactured housing in areas "outside of parks and largely rural areas." 62 Fed. Reg. 24337 (1997) (App. E, 68a). The Statement of Policy was issued "as an initial step toward the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy." *Id.* (App. E, 68a). Manufactured housing, which accounted for one-fourth of all the single-family houses that were built in this country in 1995, plays a strategic role in the Clinton Administration's efforts to increase homeownership. *The National Homeownership Strategy: Partners in the American Dream* (1995) (working paper prepared by United States Department of Housing and Urban Development).

5. Previously, HUD analyzed zoning practices on a case-by-case basis, issuing "preemption letters" to the offending municipalities. 62 Fed. Reg. 24337 (1997) (App. E, 67a).

enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 C.F.R. 3282.11(d)." *Id.* (App. E, 71a).

La Porte's zoning scheme violates § 5403(d) under HUD's Statement of Policy 1997-1.[6] La Porte cannot exclude HUD-code manufactured homes if the City allows other types of structures that meet the federal definition of "manufactured home" contained in 42 U.S.C. § 5402(6). 62 Fed. Reg. 24338 (App. E, 70a). Since a modular home can meet the federal definition of manufactured home,[7] and since La Porte allows modular homes in its R-1 districts but not HUD-code manufactured housing, La Porte's zoning practices are preempted by § 5403(d). Under Statement of Policy 1997-1, La Porte's reason for excluding HUD-code manufactured housing (which La Porte alleges to be unrelated to construction standards) is completely irrelevant to the analysis.

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6. Undoubtedly, since Congress has delegated its authority to HUD, 42 U.S.C. § 5424, HUD's declarations and pronouncements have no less preemptive effect than the federal statute itself. *See Fidelity Federal Savings and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982).

7. *See* 42 U.S.C. § 5402(6). La Porte argues that a "modular" home does not meet the federal definition of "manufactured home" because the latter requires a "permanent chassis." La Porte wrongly assumes that a modular home cannot be built on a permanent chassis. However, as early as 1976, HUD recognized "that some structures that have traditionally been considered to be modular homes are now sometimes being manufactured with and transported on permanent chassis similar to those used to transport [manufactured] homes." 41 Fed. Reg. 24,968 (1976). Even the Texas statute defines modular housing without making reference to a permanent chassis. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f-1, § 1(1) (Vernon 1987).

Interestingly, Mark Lewis, La Porte's Chief Building Official, described a modular home as a "type of manufactured home" (Exh. 1 to Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment).

Given the timing of its publication (May 5, 1997), HUD's Statement of Policy 1997-1 was not considered by the Fifth Circuit, which rendered its decision on April 10, 1997. There is a reasonable probability that, upon further consideration, the Fifth Circuit would find the Statement of Policy applicable to the facts of this case, which would change the ultimate outcome of this litigation. Under these circumstances, it would be appropriate for this Court to issue a GVR order. *See Lords Landing*, 117 S.Ct. at 1732.

III.

WHERE A MUNICIPAL REGULATION HAS THE PRACTICAL EFFECT OF ENCROACHING UPON AN AREA OF LAW RESERVED EXCLUSIVELY BY CONGRESS, THE PREEMPTION VIOLATION SHOULD NOT BE EXCUSED SIMPLY BECAUSE THE MUNICIPALITY DID NOT INTEND TO CREATE THE UNLAWFUL EFFECT.

The Fifth Circuit's decision conflicts with the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521. In *Scurlock*, a local land use ordinance excluded from particular residential districts any structures that were not constructed to meet a finite set of building codes that had been sanctioned by the city. On appeal, the Eleventh Circuit held that, because it effectively imposed a different set of construction standards on HUD-code manufactured homes (which did not meet the different standards), the ordinance was preempted by 42 U.S.C. § 5403(d). *Id.*, 858 F.2d at 1525; *see Colorado Manufactured Housing Association v. Board of County Commissioners, etc.*, 946 F.Supp. 1539 (D. Colo. 1996) (same).

The only distinction between this case and *Scurlock* is the issue of intent. In *Scurlock*, the City of Lynn Haven expressly

intended to condition entry into its R-AA residential districts upon compliance with a prescribed set of building codes. La Porte is similarly conditioning entry into its R-1 residential districts upon compliance with a prescribed set of building codes,[8] but there is no direct proof available that La Porte actually *intends* this result.[9]

If *Scurlock* is distinguishable, it is only because La Porte's *intent* is viewed as decisive in evaluating the preemption question. In dismissing TMHA's claim, District Judge Atlas focused *solely* on intent, finding that "La Porte's exclusion of manufactured housing from 'R-1' districts . . . is merely a restriction on [the] *location* of manufactured housing" (App. C, 10a) (emphasis in original). This Court, however, has historically ignored intent when deciding preemption cases. *See, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132,

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8. According to La Porte's Ordinance 1501, modular housing is permissible in the City's R-1 residential districts, while HUD-code manufactured housing is prohibited. It can fairly be concluded, therefore, that La Porte accepts factory-built housing that is constructed to one set of standards (*i.e.*, modular housing) but excludes factory-built housing that is built to another set of standards (*i.e.*, HUD-code manufactured housing).

9. There is nothing in the language of its Ordinance 1501 which proves that the exclusion of HUD-code manufactured housing is based on La Porte's preference for structures that are constructed to meet its local building code, but there is circumstantial evidence in the summary judgment record which suggests that the building code issue plays a role in La Porte's decisionmaking. For example, during the discovery phase of this lawsuit, La Porte proclaimed that modular homes are "constructed to meet more stringent safety requirements than are HUD-code homes" (Exh. M [p. 16] to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment). Similarly, in a letter to Ms. Stevenson, La Porte's Chief Building Official wrote that, as between the two types of factory-built housing, a modular home "will comply with the City's zoning and *building code* requirements" (Exh. 2 to Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment) (emphasis added).

142 (1963) ("The test [is] not whether [the two laws] are aimed at similar or different objectives"). This Court has long acknowledged that a statute designed to operate in one substantive area can have demonstrative effects in an exclusive area reserved by Congress. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992) (regulating advertising affects rates); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (common law damages actions have the effect of imposing affirmative requirements).

Intent, therefore, is too narrow to serve as the focal point in preemption analysis. Accordingly, La Porte should not be able to escape liability simply by asserting that its *intention* is something other than conditioning entry upon compliance with a prescribed set of building codes.[10] Moreover, the fact that La Porte was exercising its police power should be completely irrelevant where the supremacy of federal law is at stake. *See, e.g., Love v. Foster*, 90 F.3d 1026 (5th Cir.), *pet. for reh'g and suggestion for reh'g en banc denied*, 100 F.3d 413 (5th Cir. 1996), *cert. granted*, 117 S.Ct. 1243 (1997) (invalidating on preemption grounds Louisiana's open primary election system as it applies to federal elections).

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10. It is undisputed that *intentionally* conditioning entry upon compliance with a prescribed set of building codes violates 42 U.S.C. § 5403(d). *See Scurlock*, 858 F.2d 1521. This result should not change merely because the condition is *unintentional*.

IV.

WHERE A MUNICIPAL REGULATION HAS THE PRACTICAL EFFECT OF DISCRIMINATING AGAINST INTERSTATE COMMERCE IN FAVOR OF INTRASTATE COMMERCE, THE DORMANT COMMERCE CLAUSE VIOLATION SHOULD NOT BE EXCUSED SIMPLY BECAUSE THE MUNICIPALITY WAS NOT ACTING WITH A PROTECTIONIST INTENT.

Under the Dormant Commerce Clause, discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, etc.*, 511 U.S. 93, 99 (1994). This Court has never demanded proof of protectionist intent. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352 (1977) (there is no need to "ascribe an economic protection motive" to find discrimination). The reason for not requiring protectionist intent lies in the political theory underlying the Commerce Clause. A majority of this Court continues to recognize that enforcing the "dormant" aspect of the Commerce Clause serves the broad purpose of promoting and preserving national solidarity. *See Camps*, 117 S.Ct. at 1607-08 (1997); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). If the sting of what appears to be economic protectionism is felt, then the danger of retaliatory reprisals will not be lessened in the slightest merely because the regulation was not actually motivated by protectionism. This Court has recognized in other contexts that the objective of anti-discrimination provisions would be "difficult if not impossible to reach" if all that was proscribed was "conduct fueled by a discriminatory intent." *Alexander v. Choate*, 469 U.S. 287, 296-97 (1985). The *Oregon Waste* model of discrimination focuses, not on intent but on

whether competition between interstate commerce and intrastate commerce is negatively affected. *See, e.g., General Motors Corporation v. Tracy*, 117 S.Ct. 811 (1997) (finding no Dormant Commerce Clause violation because, *inter alia*, removal of the challenged regulation would not promote competition).

Intent played a key role in the outcome of this case. District Judge Atlas found no discrimination because there was "no evidence that La Porte was motivated by economic protectionism" (App. C, 31a). Moreover, Judge Atlas overlooked the fact that Ordinance 1501 changed the competitive aspect of the housing market. After acknowledging that Ordinance 1501 places the Texas modular housing market at a competitive advantage vis-a-vis the interstate market in HUD-code manufactured housing (App. C, 26a),[11] a finding which should have ended the inquiry in TMHA's favor, District Judge Atlas dismissed the advantage as merely "incidental" because La Porte did not *intend* to alter the competitive balance between the two industries.

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11. Modular housing and HUD-code manufactured housing compete for the same residential customers. This point was acknowledged by La Porte's Chief Building Official, who testified (1) that modular housing is an acceptable "option" for replacing a manufactured home; (2) that modular housing is "intended to be used for residential purposes;" and (3) that modular homes have "been placed in a few different locations in [La Porte]" (Exh. J to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment). Therefore, removing the ban on HUD-code manufactured housing in La Porte's R-1 residential districts would naturally increase competition for that subset of consumers who can afford both modular housing and HUD-code manufactured housing. Moreover, TMHA should not have been required to prove this point with scientific certainty. *See Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 117 S.Ct. 1590, 1600 n.15 (1997).

V.

WHERE THE CHALLENGER DEMONSTRATES A BURDEN ON INTERSTATE COMMERCE AND SUBMITS EVIDENCE OF LESS BURDENSOME ALTERNATIVES TO ACHIEVE THE STATE'S PUTATIVE PURPOSE, SUMMARY JUDGMENT IS INAPPROPRIATE TO ADVERSELY DISPOSE OF A DORMANT COMMERCE CLAUSE CHALLENGE.

Another reason for granting the writ is to develop a uniform approach for applying the *Pike* balancing test at the summary judgment level. If the challenger fails to show a burden on interstate commerce, there is nothing to balance, and summary judgment is proper. *See Gary D. Peake Excavating, Inc. v. Town Bd. of Town of Hancock, N.Y.*, 93 F.3d 68 (2d Cir. 1996); *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 513 U.S. 1183 (1995); *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992) ("the regulations imposed no burden on interstate commerce").

If, however, the challenger shows a burden on interstate commerce,[12] the burden must be weighed using the *Pike* formula. The courts of appeals have not adhered to any consistent, unifying principle for determining the circumstances when it is appropriate to apply the *Pike* test as a matter of law and when a full-blown trial on the merits is required. The caselaw reveals two conflicting approaches. For example, where a regulation's

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12. There can be little doubt that interstate commerce is burdened by any ordinance which restricts its influx into a particular locale. The summary judgment record reflects that TMHA quantified this burden at more than $1.6 million over a four-year period (Exh. O to TMHA's Response in Opposition to La Porte's Motion for Summary Judgment).

benefits and burdens are evident, some courts are content to do the balancing on the basis of a summary judgment record. *See, e.g., Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099 (3rd Cir. 1997); *Medical Waste Associates Limited Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992); *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir.), *cert. denied*, 115 S.Ct. 2580 (1995); *Kirkpatrick v. Shaw*, 70 F.3d 100 (11th Cir. 1995).[13]

In contrast, when presented with similar summary judgment records (*i.e.*, where the record discloses the state's putative interest and a burden on interstate commerce is shown), other courts are reluctant to apply the *Pike* test without a trial. *See, e.g., Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 115 F.3d 1372 (8th Cir. 1997); *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th Cir. 1995); *Blue Circle Cement, Inc. v. Board of County Commissioners, etc.*, 27 F.3d 1499 (10th Cir. 1994). In *Cotto Waxo*, the Eighth Circuit acknowledged the burden on interstate commerce but conceded it had "no concrete sense of how [the challenged regulation] has affected other manufacturers or the interstate market as a whole." 46 F.3d at 795. The court similarly acknowledged that, although the regulation benefits the public by protecting the environment, *id.* at 794, the state "failed to submit any evidence related to either the amount of conservation achieved by the [regulation] or the amount of contamination prevented by the [regulation]," *id.* at 795. In *Blue Circle*, a public purpose was articulated, but,

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13. Interestingly, the balancing in these cases consisted solely of examining the burden on interstate commerce and the purposes served by the challenged regulation. There was no discussion of whether less burdensome alternatives were available to achieve the state's purposes even though this Court continues to acknowledge that, under *Pike*, this is one of the factors to be weighed. *See Camps*, 117 S.Ct. at 1620 (Thomas, J., dissenting).

because the regulation "may further the public interest so marginally" or "interfere with commerce so substantially," the court found that the mere incantation of a public purpose is "inadequate to support a summary judgment" upholding the regulation. 27 F.3d at 1512 (quoting *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981)).

If a burden on interstate commerce is shown, and if the state articulates a public purpose that is served by the challenged regulation, the question of whether the *Pike* test can be applied as a matter of law should turn on whether the challenger submits evidence on *Pike*'s third element, *viz.*, the availability of less burdensome alternatives to achieve the state's purposes. If the challenger fails to submit evidence on this point, then the *Pike* test is little more than a policy choice between two competing interests, *see Camps*, 117 S.Ct. at 1619-20 (Thomas, J., dissenting), a decision which courts could make just as easily at the summary judgment stage without further inquiry into either the extent of the burden or the extent to which the regulation actually achieves the public purpose. If, however, the challenger submits summary judgment evidence of less burdensome alternatives (as TMHA did here), then determining the extent to which the alternatives can achieve the state's purposes necessarily calls for factual inquiries that should only be developed by a full-blown trial on the merits.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. Alternatively, this Court should issue a GVR order.

Respectfully submitted,

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
Attorneys for Petitioner
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 7, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20422

TEXAS MANUFACTURED HOUSING ASSOCIATION; ET AL

Plaintiffs

TEXAS MANUFACTURED HOUSING ASSOCIATION

Plaintiff - Appellant

v.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT

Defendant - Appellee

Appeal from the United States District Court for the Southern District of Texas, Houston

ON PETITION FOR REHEARING

Before JONES, STEWART, and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is denied.

Appendix A

ENTERED FOR THE COURT:

s/ Edith H. Jones
United States Circuit Judge

APPENDIX B — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED APRIL 10, 1997

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-20422

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC., ET AL.,

Plaintiffs,

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Plaintiff-Appellant,

versus

CITY OF LA PORTE, AND ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
Houston Division
(H-94-CV-1066)

Before JONES, STEWART, and DENNIS, Circuit Judges

PER CURIAM:*

The Texas Manufactured Housing Association, Inc., ("TMHA") and Jan Stevenson brought this suit against the City

* Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

of La Porte and the Zoning Board of Adjustment of the City of La Porte (collectively, "La Porte") to challenge La Porte's denial of Mrs. Stevenson's request to place a manufactured home on her lot in an R-1 residential district. La Porte denied the request pursuant to its Ordinance 1501, which specifically excludes manufactured housing from R-1 residential districts. Mrs. Stevenson eventually settled her claim with La Porte, and the district court granted summary judgment for La Porte on all of TMHA's numerous challenges to Ordinance 1501. On appeal, TMHA only challenges the denial of its commerce clause, federal and state preemption, and equal protection claims.

Having carefully considered the oral arguments, briefs, the opinions of the district court, and the record, we conclude that the recent panel decision in *Texas Manufactured Housing Ass'n, Inc. v. Nederland*, 101 F.3d 1095 (5th Cir. 1996), essentially forecloses TMHA's arguments. In particular, we have reviewed the affidavits and exhibits** relied upon by TMHA at oral

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** Including, but not limited to, the letters of Mark S. Lewis, Chief Building Official of La Porte, to Mrs. Stevenson dated October 6, 1993 and October 14, 1993, and the affidavit of Will Ehrle, President and General Counsel of TMHA.

We have also reviewed the decision in *Colorado Manufactured Housing Association v. Board of County Commissioners of the County of Pueblo, Colorado*, 946 F. Supp. 1539 (1996), submitted by TMHA pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure. As to its treatment of the preemption issue, we do not find that opinion to be contrary to our decision, since the court only found preempted local ordinances which permitted manufactured housing only if it met local building or safety codes that were stricter than the federal requirements. *Id.* at 1551-1552. The court did not find preempted those zoning ordinances which completely barred manufactured housing from residential zones. *Id.*

As to the Colorado court's treatment of the commerce clause issue, there is insufficient discussion of the facts found to bar summary judgment for the decision to have persuasive effect on our decision. *Id.* at 1555.

argument to distinguish *Nederland*, and conclude that there is no distinction sufficient to raise a genuine issue of material fact on its commerce clause, preemption, or equal protection claims. Accordingly, we AFFIRM the decision of the district court.

APPENDIX C — MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED AUGUST 9, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-94-1066

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Plaintiff,

v.

CITY OF LA PORTE, et al.,

Defendants.

MEMORANDUM AND ORDER ON MOTION FOR RECONSIDERATION

Plaintiff Texas Manufactured Housing Association, Inc. ("Plaintiff") has filed a **Motion for Reconsideration** [Doc. # 51] ("Plaintiff's Motion") of this Court's Memorandum Opinion granting summary judgment in favor of Defendants on all of Plaintiff's claims and denying summary judgment in favor of Plaintiff.[1] Plaintiff's Motion argues strenuously that this Court

1. Specifically, Plaintiff requests that this Court vacate, alter or amend its Memorandum Opinion [Doc. # 49], as well as its Order granting Defendants' summary judgment motion [Doc. # 47], its Order denying Plaintiff's summary judgment motion [Doc. # 48], and its Final Judgment [Doc. # 50].

erred in granting summary judgment in favor of Defendants ("City" or "La Porte") on Plaintiff's claims under the Commerce Clause and on Plaintiff's argument that Ordinance 1501 of the City of La Porte is pre-empted by federal law. *See* City of La Porte Zoning Ordinance 1501 (Exhibit A-1 to Defendants' Motion for Summary Judgment [Doc. # 13]) ("Ordinance"). Plaintiff also argues that there is a fact question as to the application of rational basis review under the Due Process and Equal Protection Clauses. Since the City also has addressed this matter, the Court will reconsider its ruling in that regard as well.

For the reasons stated herein, it is now ordered that the Motion for Reconsideration is granted. It is, however, further ordered that Plaintiff's request that this Court vacate its previous Memorandum Opinion is denied. This Order supplements and clarifies the Court's prior Memorandum Opinion.

Federal Pre-emption

Plaintiff argues that summary judgment in favor of Defendants on its claim of federal pre-emption was error.[2] Specifically, Plaintiff argues that the City's motivation for excluding HUD-code manufactured homes from "R-1" districts in La Porte is "based on the City's preference for structures which are built to its local building code, including modular homes." Plaintiff's Motion, at 19.[3]

2. Plaintiff also moved for summary judgment on this claim, *see* Doc. # 46, and therefore takes the position that there are no genuine issues of material fact.

3. Neither this Order nor the pleadings in this lawsuit address the question of whether the conditions imposed on manufactured homes in La Porte's "R-2" and "R-3" districts are pre-empted.

Appendix C

The evidence cited by Plaintiff as supporting its argument concerning the City's actual motivation is as follows: first, the City allows modular homes to be placed on individual lots in "R-1" districts; second, modular homes are constructed to La Porte's building code; and third, the City's responses to Plaintiff's requests for admissions and interrogatories demonstrate that the City does not consider HUD-code manufactured homes to be as safe as modular or conventional site-built homes and specifically stated that "[m]odular/ industrialized homes are constructed to meet more stringent safety requirements than are HUD-code homes." Plaintiff's Motion, at 20-21.[4] Plaintiff asserts that this evidence "demonstrate[s] unequivocally" that the City believes that HUD-code homes, because of the building code to which they are built, are not as safe as either modular or conventional site-built homes, and therefore that "it can reasonably be concluded that HUD-code homes are being excluded from R-1 districts because of safety concerns and a preference for the local building code." *Id.* at 21.

As noted in this Court's previous Memorandum Opinion, the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401 *et seq.*, states that

> no State or political subdivision of a State shall have any authority either to *establish, or continue in effect*, with respect to any manufactured home covered, *any standard regarding construction or safety* applicable

4. *See* City of La Porte's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production (Exhibit M to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17] ("Original Response")), at 16-17.

> to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d) (emphasis added). Even assuming *arguendo* that, as Plaintiff urges, the City's exclusion of HUD-code homes from La Porte's "R-1" districts is based upon a belief that HUD-code homes are not as safe as other types of homes because of the building code to which they are constructed, and even if the City's belief is erroneous, such evidence simply does not demonstrate that the City, by the exclusion, has "establish[ed] or continue[d] in effect" a construction or safety standard that applies to manufactured homes.[5] Indeed, rather than establish construction or safety standards for manufactured homes, La Porte has excluded manufactured homes from its "R-1" districts.[6]

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5. *Cf. Georgia Manufactured Housing Ass'n, et al. v. Spalding County, Ga. et al.*, No. 3:94-CV-51-GET, slip op. at 18 (N.D. Ga. June 13, 1996) (attached to Plaintiff's letter to the Court, dated June 27, 1996) ("*Georgia Manufactured Housing* decision") (holding that Spalding County ordinance's 4:12 roof pitch requirement for manufactured houses is pre-empted by federal law because it interferes with the federal statute's construction and safety requirements).

6. Furthermore, Plaintiff has provided no authority to support its argument that this Court must look to an *implicit* purpose of an ordinance, such as safety regulation, in order to ascertain whether or not the ordinance is pre-empted. The case law clearly establishes that federal pre-emption of state law may occur in three ways: (1) when Congress expressly pre-empts state law; (2) when Congress legislates so comprehensively that it implies a congressional intent to pre-empt state regulation in the area; (3) when state law is displaced because of a conflict with federal law. *Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 360, 363 (5th Cir. 1995); *Morgan City v. South La.*

(Cont'd)

Appendix C

Plaintiff relies heavily on an Eleventh Circuit decision holding that a town's ordinance, which required manufactured homes placed in certain zones to meet local or state building codes, was a safety requirement pre-empted by federal statute. *See Scurlock v. Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988). However, the Eleventh Circuit's opinion explicitly rejected Plaintiff's contention that regulation of location of manufactured homes is pre-empted, noting that the City of Lynn Haven "[u]ndoubtedly . . . could limit Zone R-AA to conventionally-built residences and exclude mobile homes." *Id.* at 1525.

As the Court held in the previous Memorandum Opinion, La Porte's exclusion of manufactured housing from "R-1" districts, which is merely a restriction on *location* of manufactured housing, is not pre-empted by federal statute. Therefore, the Court's prior order granting summary judgment in favor of Defendants will not be vacated.

Rational Basis (Due Process and Equal Protection)

A legislature "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (internal

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(Cont'd)

Elec. Coop. Ass'n, 31 F.3d 319, 322 (5th Cir. 1994), *cert. denied*, 116 S. Ct. 275 (1995). Conflict pre-emption, which is the third type, may occur when either (1) a provision of state law is incompatible with a federal statute such that compliance with both is a "physical impossibility" or (2) the application of state law would disturb, interfere with, or seriously compromise the purposes of the federal statutory scheme. *Morgan City*, 31 F.3d at 322. This analysis looks to the purposes of *federal* legislation and the intent of the *federal* Congress, and does not support Plaintiff's argument that the intent of the state or local lawmakers should be considered by this Court in deciding the pre-emption question.

quotation marks and citations omitted); *see also Richard v. Hinson*, 70 F.3d 415, 417 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 2522 (1996). The Supreme Court has recently recognized that "most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." *Romer v. Evans*, 116 S. Ct. 1620, 1627 (1996) (citing *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 271-72 (1979)). Under the Court's rational basis test, which is applied when a classification neither burdens a fundamental right nor targets a suspect class, "a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." *Id.* (citing cases). The Equal Protection Clause "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices," and those challenging the rationality of a legislative classification have the burden to negate "every conceivable basis" which might support it. *Federal Communications Comm'n v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-2102 (1993). Moreover, the absence of legislative facts explaining a classification has no significance in the rational basis analysis, since the classification "may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 2102.[7]

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7. *See also Gregory*, 501 U.S. at 473 (Missouri's mandatory retirement law for some state judges does not violate Equal Protection Clause, even though it is "far from true that all judges suffer significant deterioration in performance at age 70," it is "probably not true that most do," and it "may not be true at all"; the people of Missouri "rationally could conclude that the threat of deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step aside at age 70"); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981) (whether *in fact* the statute achieved its purpose is not the question; Equal Protection Clause is satisfied by conclusion that legislature *could rationally have decided* that the statute might promote its purpose).

Appendix C

Under the Due Process Clause, local zoning ordinances are unconstitutional only if they are "clearly arbitrary and unreasonable, having no substantial relation to the public safety, morals, or general welfare." *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). Zoning ordinances are entitled to the same deference as state statutes, and constitutional challenges are evaluated under the rational basis test. *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986).

Plaintiff's Motion, while requesting reconsideration of the Court's application of the rational basis test and referring generally to the existence of questions of fact, provides no argument on this point. The Court therefore refers to Plaintiff's original summary judgment response, in which Plaintiff argued that there is no rational basis for La Porte's differential treatment of manufactured housing.

Defendants have argued that the crucial difference between manufactured homes and industrialized homes is that "manufactured homes are designed and constructed for permanent transportability and other forms of housing, including industrialized housing, are not," and therefore that manufactured housing may lead to a decrease in property values. Defendants' Response to Plaintiff's Motion for Reconsideration [Doc. # 55] ("Defendants' Response").[8] La Porte argues, as it did in its

8. Under federal law, a manufactured home is defined as one that has a permanent chassis and is designed to be used with or without a permanent foundation. *See* 42 U.S.C. § 5402(6). By contrast, Texas law defines industrialized housing to mean a residential structure that is "designed to be used as permanent residential structure" and is composed of modules or modular components that are "erected or installed on a permanent foundation system." Tex. Rev. Civ. Stat. Ann. art. 5221f-1, § 1(1) (Vernon 1987).

original summary judgment motion, *see* Defendants' Motion for Summary Judgment [Doc. # 13] ("Original Motion"), at 4-6, that it is rational for city officials to conclude that owners of manufactured homes, "who can literally pick up their houses and move them if their neighborhood declines," will have reduced economic interest in the viability of their neighborhood and city. Defendants' Response, at 5.[9] Indeed, although Janet Stevenson, formerly a plaintiff in this action, stated in her affidavit that "[i]f [she] had been allowed to replace [her] manufactured home, [she] intended to place it on a permanent foundation which would have been bolted or welded to piers buried deep in the ground," Stevenson Affidavit (Exhibit B to Original Response), at 3, her affidavit also supported Defendant's position. Stevenson stated that one of the reasons she had chosen to live in a manufactured home was that "[i]f [she] needed to move away from the area, *[she] could take [her] home with [her]* without losing [her] investment in it" and that "[i]f in the future [she] needed a larger home or a home with more bathrooms or other features, *[she] could sell [her] manufactured home and replace it with another*." *Id.* (emphasis added).

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9. In its Response to the instant motion, the City has proffered an additional document referred to as "HUD Docket No. 92-1610 Manufactured Housing Institute's Petition for Rulemaking." *See* Exhibit 1 to Defendants' Response to Plaintiff's Motion for Reconsideration [Doc. # 55] ("Defendants' Response"). Plaintiff objects to this evidence on the grounds that it is hearsay and that it improperly supplements the summary judgment record. Plaintiff's Reply to Defendants' Response to Plaintiff's Motion for Reconsideration [Doc. # 58] ("Plaintiff's Reply"), at 1-3. Plaintiff further argues that this document, if it is considered, raises genuine issues of material fact because, according to Plaintiff, this case concerns "permanently installed, permanently sited HUD-code homes on permanent foundation systems." *Id.* at 2-3 (emphasis omitted). The Court declines to consider this document; it was submitted too late and, in any event, its relevance to the Motion is not evident.

Appendix C

Several affidavits proffered by Plaintiff assert that manufactured homes, once sited, are rarely moved.[10] These statements are not accompanied by any statistics or other data, and use vague or subjective terms of measurement. Moreover, La Porte's officials disagree. Charles Harrington, Director of Planning for the City of La Porte, stated that, "[B]ecause mobile homes are more easily transportable than other forms of residential housing, owners of mobile homes may not feel the same sense of commitment to the community and may be less likely to invest in upgrading their property through landscaping and the construction of other improvements." Affidavit of Charles Harrington (Exhibit A to Original Motion), at 2-3; *accord* Preliminary Report of Vernon G. Henry, A.L.C.P., C.R.E. [Doc. # 41], at 2 (since manufactured homes "are constructed on a permanent frame. . . . the perception (as well as the reality, in many cases) of the owner as well as neighbors is that they may well be later moved").

La Porte citizens also clearly have the perception that mobility is a factor. *See* Transcript of Public Hearing and Regular Meeting of the La Porte Zoning Board of Adjustment, March 23, 1994 (Exhibit L to Original Response), at 48-56. During the public hearing concerning Stevenson's application to place a manufactured home on her lot, four persons who own nearby homes stated that they wanted Ordinance 1501 to be upheld because they believe that mobile homes or "house trailers" devalue their property. This disagreement in itself

10. *See* Affidavit of Will Ehrle, President and General Counsel of TMHA (Exhibit E to Original Response), at 3 ("[o]n the issue of mobility, the available statistical data reveals that a substantial number of all manufactured homes are not moved from their initial place of installation"); Affidavit of Welford Sanders (Exhibit F to Original Response), at 3 (manufactured homes, once sited, "are rarely moved, and the hitch, axles, and wheels are removed").

demonstrates that the matter is "at least debatable." Thus, this Court concludes that Plaintiff has not satisfied its burden of negating every conceivable rational basis for the Ordinance's exclusion. *Federal Communications Comm'n*, 113 S. Ct. at 2101-2102.[11]

Furthermore, La Porte has proffered the appearance of manufactured homes as an additional rational basis for their exclusion from "R-1" districts. Plaintiff's response to this argument is carefully qualified:

> *[M]any* HUD-code manufactured homes built today are multi-section homes. *Although there is a broad spectrum of styles available*, there are *many* multi-section homes built today which bear a striking

11. The Court further notes that statistics about mobility provided in one of Plaintiff's experts' reports further support La Porte's rational basis. *See* City of La Porte Housing Needs (dated February 28, 1995) (attached to Affidavit of Larry Keating (Exhibit Q to Original Response)) ("Keating Report"), at 11-12. Table 5 of the Keating Report, entitled "Year Moved into Unit by Housing Characteristics," measures mobility of persons who own three types of homes: (1) single family, attached or detached, (2) manufactured home, and (3) multifamily housing. The data reports that the average length of residence for an owner-occupied single family home is 6.26 years, whereas the average for an owner-occupied manufactured home is only 4.09 years — in other words, tenure in La Porte's single family homes is, on average, 53.06% longer than tenure in the City's manufactured homes. The data in Table 5 also reflects that, out of 25,240 households in owner-occupied single family homes, 11,234 (44.51%) have been in the same housing unit since 1979 or before, whereas 14,006 (55.50%) have been in the unit since 1980 or after; by contrast, out of 1,676 households in owner-occupied manufactured homes, only 345 (22.98%) have been in the same unit since 1979 or before, and 1,291 (77.03%) have been in the unit since 1980 or after.

> resemblance to site-built homes. . . . In addition . . ., planners across the country are now stressing the important role that permanent foundation systems, landscaping, siding, and roofing can play in fostering the compatibility of manufactured housing with surrounding conventional site-built homes.

Original Response, at 25-26.[12] "[N]ew manufactured homes built today are available in a *wide range* of sizes and prices, with *varying levels* of excellence and amenities. . . . *[M]any* HUD-code homes . . . [are] compatible with, and even indistinguishable from, site-built homes." Ehrle Affidavit, at 5.

Given this "wide range" of manufactured homes, Plaintiff has not met its burden of establishing that the City has no rational basis for relying upon appearance in excluding manufactured homes from "R-1" districts. Summary judgment in favor of La Porte, therefore, is appropriate on this ground as well.

Commerce Clause

Plaintiff also moves this Court for reconsideration of its holding granting summary judgment in favor of La Porte on Plaintiff's Commerce Clause claim.[13] This Court previously held

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12. Plaintiff's emphasis on the need for features such as landscaping and other improvements undercuts its economic argument about La Porte's irrational denial of low-cost affordable housing.

13. Plaintiff originally moved for summary judgment on the Commerce Clause issue, *see* Doc. # 46, and therefore took the position that there are no genuine issues of material fact pertaining to this claim. However, Plaintiff inconsistently submitted a list of issues it contends are fact questions on the (Cont'd)

that Ordinance 1501's exclusion of manufactured homes from "R-1" districts is an evenhanded regulation with only incidental effects on interstate commerce, and that the burden on interstate commerce resulting from the Ordinance was not clearly excessive in light of the putative local benefits. Memorandum Opinion, at 17-18.[14] The Memorandum Opinion addressed the only complaint raised by Plaintiff about the ordinance, which was the exclusion of manufactured housing from "R-1" districts; no claims concerning the validity of "R-2" or "R-3" districts are before this Court.[15] For the reasons stated herein, the Court remains convinced that there are no genuine issues of material fact as to Plaintiff's claim under the Commerce Clause, and that summary judgment is appropriate in favor of La Porte.

Potentially Applicable Legal Tests. — There are two possible routes of analysis under the Commerce Clause. If an ordinance regulates evenhandedly with only incidental effects on interstate commerce, then it is valid unless the burden imposed on such commerce is clearly excessive in relation to the putative

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(Cont'd)
Commerce Clause issue. *See* Genuine Issues of Material Fact (Exhibit A to Plaintiff's Motion), at 10. None of these purported issues raise genuine questions of material fact. Most are legal questions. The rest are either not "material" or not established by the record to be genuine fact questions.

14. The district court in the Georgia action, ruling on Commerce Clause challenge to a similar zoning ordinance, reached the same conclusion. *Georgia Manufactured Housing* decision, *supra* note 5, slip op. at 20-21.

15. Plaintiff's pleadings complain only of the Ordinance's exclusion of manufactured housing from "R-1" districts. *See* Complaint and Petition for Writ of Certiorari and for Permanent Injunctive Relief [Doc. # 1]. Presumably, this is because Janet Stevenson, the only individual plaintiff in this action, had not been permitted to put a manufactured home on her lot, which had been zoned "R-1."

local benefits. *Oregon Waste Systems v. Department of Environmental Quality*, 114 S. Ct. 1345, 1350 (1994); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). This flexible approach, often referred to as "the *Pike* test," is available only " 'where other legislative objectives are credibly advanced *and* there is *no* patent discrimination against interstate trade.' " *Chemical Waste Management, Inc. v. Hunt*, 112 S. Ct. 2009, 2014 n.5 (1992) (emphasis original) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). If, on the other hand, an ordinance discriminates against interstate commerce or its effects favor in-state economic interests at the expense of out-of-state interests, the statute is unconstitutional unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism. *Fort Gratiot Landfill v. Mich. Dep't of Natural Resources*, 112 S. Ct. 2019, 2024 (1992); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992); *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994). When an ordinance discriminates against interstate commerce, either on its face or in its effect, it is therefore subject to stricter scrutiny: the city must show that the ordinance advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. *Oregon Waste*, 114 S. Ct. at 1351; *Fort Gratiot*, 112 S. Ct. at 2027.

Determination of Appropriate Legal Test. — In order to decide which of the above tests to apply, this Court must determine, as stated in the previous Memorandum Opinion, at 17, whether Ordinance 1501 regulates evenhandedly with only incidental effects on interstate commerce, or whether it discriminates against interstate commence.[16] *See Fulton Corp.*

16. Plaintiff does not argue that the Ordinance is facially discriminatory against interstate commerce; Plaintiff argues instead that the Ordinance is discriminatory in its effect.

v. Faulkner, 116 S. Ct. 848, 854 (1996). The Supreme Court has recognized that there is no "clear line" separating legislation that is subject to the stricter standard and that subject to the flexible *Pike* analysis. *Chemical Waste*, 112 S. Ct. at 2014 n.5; *Brown-Forman Distillers v. New York State*, 476 U.S. 573, 579 (1986).

Plaintiff's Motion argues strenuously that the Ordinance 1501's exclusion of manufactured homes from "R-1" districts creates a discriminatory effect on interstate commerce, and therefore that stricter scrutiny must be applied. It is Plaintiff's burden to show that the Ordinance discriminates against interstate commerce, so as to warrant stricter scrutiny. *See Hughes*, 441 U.S. at 336.

Plaintiff's Motion makes several arguments in support of reconsideration. First, Plaintiff argues that this Court erred "by holding that discrimination with only a limited effect on interstate commerce is not actionable under the Dormant Commerce Clause." Plaintiff's Motion, at 6. Plaintiff misstates this Court's holding, which was not that the Ordinance was discriminatory with only "limited effects" on interstate commerce, but rather that it was an evenhanded regulation with incidental effects.[17] While the Supreme Court's teachings indeed

17. Much of Plaintiff's argument for reconsideration flows from this Court's prior statement that "Ordinance 1501 regulates evenhandedly and that, since HUD-code manufactured homes may flow freely into La Porte, there is only an incidental effect, if any, on interstate commerce." Memorandum Opinion, at 17. This sentence, though perhaps unartfully drafted, did not hold that the more flexible *Pike* analysis applied *because* of the ordinance's limited effect on interstate commerce. Rather, as clarified in this Order, the Court holds that the *Pike* analysis applies because Ordinance 1501 is an evenhanded zoning regulation with only incidental effects on interstate commerce.

do state that the *amount* of discrimination is irrelevant, once discrimination is established, Plaintiff has not met its initial burden of establishing that the Ordinance is in fact discriminatory.[18] Plaintiff's argument has bypassed the threshold question: Is Ordinance 1501 an evenhanded regulation with incidental effects on interstate commerce, rather than a discriminatory measure?[19]

Second, Plaintiff argues that this Court improperly weighed the evidence when assessing the effects of the Ordinance's contested provision. Plaintiff's Motion for Reconsideration points out to the Court for the first time that "R-1" districts comprise a large percentage of the residential area of La Porte. City of La Porte Zoning Map (attached to Supplemental Report of Waldo S. Luedemann, Jr. (attached to Affidavit of Waldo S. Luedemann, Jr. (Exhibit P to Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17])))) ("Zoning Map"). Furthermore, although manufactured housing is permitted in La Porte's "R-2" and "R-3" districts, certain conditions are imposed before it can be placed there. Ordinance

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18. As Plaintiff correctly points out, the volume of commerce affected by the ordinance has no relevance to the determination of whether or not the ordinance is discriminatory. *See, e.g., Wyoming*, 112 S. Ct. at 801 ("[t]he volume of commerce affected measures only the *extent* of the discrimination; it is of no relevance to the determination whether a State has discriminated against interstate commerce") (emphasis original). However, the Court notes that the *Wyoming* Court also held that the statute in question was discriminatory on its face and in its effect, and therefore that the stricter scrutiny test was appropriate. *Id.*

19. Plaintiff also blurs the concept of "discriminatory effect" with that of a "burden" on interstate commerce. While discriminatory effect is prohibited, a burden on interstate commerce is not necessarily unconstitutional. *See infra* at 15-16.

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(Exhibit A-1 to Defendants' Original Motion) § 5-600, at 32-33. The "MH" district — the only district in which manufactured housing may be placed without restriction — is a very small percentage of the City's residential area. *See* Zoning Map. By contrast, industrial (or modular) homes are permitted in all residential zones of La Porte, although the Ordinance specifies that the housing must be on a permanent foundation system. Ordinance, 5-600, at 32.[20] Plaintiff alleges that industrialized homes are manufactured exclusively in Texas,[21] and therefore

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20. Although this evidence now relied upon by Plaintiff was included among the voluminous exhibits filed with the original summary judgment papers, it was not discussed or referred to in the briefing. *See Jones v. Sheehan, Young & Culp, P.C.*, 82 F.3d 1334, 1338 (5th Cir. 1996) (Rule 56 "saddles the non-movant with the duty to 'designate' the specific facts in the record that create genuine issues precluding summary judgment, and does not impose upon the district court a duty to survey the entire record in search of evidence to support a non-movant's opposition"). Plaintiff's prior summary judgment briefing — including Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17], Plaintiff's Supplemental Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 43], and Plaintiff's Motion for Partial Summary Judgment [Doc. # 46] — did not mention the relative sizes of La Porte's various residential districts or the conditions placed on manufactured homes in "R-2" and "R-3" districts. Nor does the briefing identify the Zoning Map, which is buried among Plaintiff's numerous exhibits as one of many attachments to Luedemann's various affidavits and reports, all of which were filed together as Exhibit P.

21. Defendant points out that Texas law permits industrialized housing to be built in other states, and that industrialized housing must meet or exceed certain national building codes. Defendants' Response, at 6; *see* Tex. Rev. Civ. Stat. Ann. art. 5221f-1, §§ 2(a) & 4(c) (Vernon 1987 & Supp. 1996). There is no reason why industrialized homes (which are modular, *i.e.*, built in prefabricated pieces and then assembled on-site), could not be transported across state lines. See Tex. Rev. Civ. Stat. Ann. art. 5221f-1, § 1(1) (Vernon 1987). Nor is there any indication that manufactured homes are not being constructed in Texas.

argues that the Ordinance is discriminatory against out-of-state interests who produce manufactured homes and that the magnitude of the Ordinance's effect on interstate commerce should not be analyzed. Plaintiff's Motion, at 14-16.

Plaintiff's evidence about the relative size of La Porte's residential districts and the conditions on manufactured homes placed in "R-2" and "R-3" districts may indicate that La Porte's exclusion of manufactured homes from "R-1" districts has a perceptible effect on interstate commerce.[22] The Court need not and does not decide this issue, however. Even assuming a perceptible burden on interstate commerce, it does not necessarily follow that Ordinance 1501 is impermissibly discriminatory

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22. *See* The Effects of Zoning on New Manufactured Housing Sales (attached to Affidavit of Gordon Otto (Exhibit O to Original Response)), at § C (total lost sales attributed to La Porte's restrictive zoning is $1,720,097 in 1994); Supplemental Report of Gordon H. Otto (Exhibit B to Supplemental Disclosure of Experts [Doc. # 23]), at § 6 (almost three times as many manufactured homes were installed in Vidor, which does not restrict their placement, than in La Porte, despite the fact that La Porte has almost 2.5 times as many households).

Plaintiff's proof is extremely weak. The statements made in the submitted reports are vague, largely unquantified and unpersuasive. There are many variables that would need to be analyzed to ascertain conclusively whether in fact there was an identifiable and statistically significant impact on interstate commerce resulting from the prohibition of manufactured homes from a segment of a single city, La Porte, amounting to less than ten (10) square miles of land. *See* Leudemann Affidavit (Exhibit P to Original Response), at 9 (La Porte encompasses an area of 18.33 square miles); Zoning Map (approximately 50% of La Porte is zoned "R-1"). One variable, for example, is whether people in any numbers in fact want to move manufactured homes into the R-1 districts. Moreover, the Court cannot ascertain on this record whether a single comparison with the City of Vidor is demographically or socio-economically relevant.

against interstate commerce, and therefore can trigger stricter scrutiny. Rather, "the real question is whether the [challenged legislative action] is valid *despite its undoubted effect on interstate commerce*," and for this inquiry, it must be determined whether to apply the *Pike* analysis or stricter scrutiny. *See C & A Carbone*, 114 S. Ct. at 1682 (emphasis added); *see also Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980) ("in the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' *even though interstate commerce may be affected*") (emphasis added). Indeed, in *Clover Leaf*, a case factually analogous to the one at bar, the Supreme Court noted that a state statute burdened interstate commerce, but nevertheless applied the *Pike* test in order to determine whether or not the statute was unconstitutional. *Clover Leaf*, 449 U.S. at 472-73.[23]

Upon reconsideration, viewing all evidence in the light most favorable to Plaintiff, the Court again holds that application of stricter scrutiny is not warranted. La Porte's exclusion of manufactured homes from "R-1" districts is an evenhanded zoning regulation. Other cases analyzing Commerce Clause challenges to zoning ordinances have reached the same conclusion, and have applied the *Pike* test.

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23. Plaintiff also argues that this Court's decision was in error because it "suggests that La Porte can avoid a finding of discrimination simply by demonstrating accommodation in certain geographic areas." Plaintiff's Motion, at 5; *see Fort Gratiot*, 112 S. Ct. at 2024 ("a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State, rather than through the State itself"). However, La Porte avoids such a finding not because only portions of the City are affected by the exclusion, but rather because, as stated herein, Ordinance 1501 is an evenhanded zoning regulation and its effects are merely incidental to the Ordinance's application.

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The First Circuit recently rejected a Commerce Clause challenge to a "cease and desist" order issued by the town of Plaistow, New Hampshire, which prohibited heavy commercial trucking traffic to and from the town terminal in the late night hours. The town's order imposed the nighttime restrictions because of the "odors, smoke, fumes, noise and vibration" resulting from the traffic, and was issued pursuant to a zoning ordinance which prohibited "uses that may be obnoxious or injurious by reason of the production or emission of odors, dust, smoke, refuse matter, fumes, noise, vibration or other similar conditions, or that are dangerous to the comfort, peace, enjoyment, health or safety of the community." *New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326, 327-28 (1st Cir. 1995), *cert. denied*, 116 S. Ct. 1352 (1996). The Court concluded without difficulty that the case did not involve discrimination against interstate commerce, and proceeded to hold, under the *Pike* test, that the burdens on interstate commerce created by the time restrictions were not clearly excessive to the benefits conferred on the town's citizens, noting that the curfew was "akin to zoning and traffic restrictions traditionally applied on a local level." *Id.* at 332-33.

Similarly, the Tenth Circuit, in evaluating a Commerce Clause challenge to a county's hazardous waste zoning ordinance, held that the ordinance's site conditions had to be evaluated under the *Pike* test, rather than the stricter test "reserved for statutes that explicitly, or by application, discriminate based upon the origin of the article of commerce," because the site conditions applied equally to hazardous waste generated within the county and outside the county, and "confer[red] no advantages on in-state entities seeking to store, treat, recycle, or dispose of [hazardous waste] as against out-of-state firms." *Blue Circle Cement, Inc. v. Board of County*

Commissioners, 27 F.3d 1499, 1511-12 (10th Cir. 1994). *See also Old Bridge Chemicals, Inc. v. New Jersey Dep't of Environmental Protection*, 965 F.2d 1287, 1294 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992) (*Pike* analysis applied to evaluate Commerce Clause challenge to New Jersey's statutory definition of "solid waste," which was more expansive and stringent than federal definition and therefore caused certain waste in interstate shipment to be subject to federal hazardous waste regulations); *Wood Marine Serv., Inc. v. City of Harahan*, 858 F.2d 1061, 1064-65 (5th Cir. 1988) (zoning ordinance, which restricts private commercial development on portion of riverbank, does not discriminate against interstate commerce; ordinance is directed at local landowners alone, and its purpose is not to favor local economy but to stop further commercial development within city's boundaries).[24]

Plaintiff has cited the Court to no cases in which stricter scrutiny under the Commerce Clause was applied to a zoning ordinance. This Court declines to be the first.

Ordinance 1501 bans *all* manufactured homes, whether constructed in Texas or elsewhere, from "R-1" districts. An incidental effect of this regulation is that the placement in La Porte of industrialized homes, which are not similarly banned from "R-1" districts, is less restricted than the placement of manufactured homes. Plaintiff argues that La Porte's restriction on the location of manufactured houses impermissibly favors the Texas industrialized housing industry. However, in *Clover*

24. The Fifth Circuit held in *Wood Marine* that the zoning ordinance at issue created *no* burden on interstate commerce. *Wood Marine*, 858 F.2d at 1065. Similarly, the Court is unconvinced that the exclusion of manufactured homes from "R-1" districts creates a burden on interstate commerce. *See supra* at 15-16.

Leaf, the Supreme Court rejected a similar argument in an analogous setting. The Court held that although the Minnesota pulpwood industry stood to gain from the statute's ban on plastic nonreturnable bottles, the statute nevertheless was an evenhanded regulation because it applied without regard to whether the milk, the containers, or the sellers came from inside or outside Minnesota. *Id.* In La Porte, manufactured housing is banned from "R-1" districts, regardless of the origin of the housing.[25] The advantage to Texas' industrialized housing industry, like that to Minnesota's pulpwood industry, is an incidental effect of this evenhanded regulation.

Where legislative objectives other than economic protectionism are "credibly advanced" and there is no "patent discrimination" against interstate trade, the courts are to apply the more flexible *Pike* test. *Chem Waste*, 112 S. Ct. at 2014 n.5 (citing *Philadelphia*, 437 U.S. at 624); *SSC Corp. v. Town of Smithtown*, 66 F.3d 502, 509-10 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 911 (1996); *SDDS, Inc. v. State of South Dakota*, 47 F.3d 263, 269 (8th Cir. 1995); *GSW, Inc. v. Long County*,

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25. In *C & A Carbone*, the Supreme Court stated that a town's flow control ordinance requiring all nonhazardous solid waste within a town, regardless of its origin, to be deposited at a certain transfer station (and thereby favoring one operator) was "no less discriminatory" because in-state or in-town processors were also disadvantaged by the ordinance. *C & A Carbone*, 114 S. Ct. at 1682. This statement, of course, does not suggest that this Court may not consider, as evidence of Ordinance 1501's evenhandedness, the fact that both in-state and out-of-state manufactured homes are banned from "R-1" districts. Indeed, as noted above, the *Clover Leaf* Court looked to analogous evidence. Moreover, whereas the Supreme Court in *C & A Carbone* held that the flow control ordinance was discriminatory because "it allow[ed] only the favored operator to process waste that is within the limits of the town," *id.*, no such favoritism or discrimination is involved in the case at bar.

Ga., 999 F.2d 1508, 1516 (11th Cir. 1993). This is such a case. La Porte has credibly advanced legislative objectives other than economic protectionism for the Ordinance's exclusion of manufactured homes from "R-1" districts — namely, preservation of property values. *See supra* at 5-10 (rational basis discussion). Whereas cases applying stricter scrutiny typically involve situations in which the basis for differential treatment of in-state and out-of-state goods is the origin of those goods,[26] the contested provision of La Porte's Ordinance 1501 does not distinguish between manufactured homes and industrialized homes based on their respective origins. The exclusion of manufactured homes from "R-1" districts is not "basically a protectionist measure," but "can fairly be viewed as a law directed

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26. *See, e.g., Oregon Waste Systems v. Dep't of Environmental Quality*, 114 S. Ct. 1345, 1349-50 (1994) (Oregon surcharge imposed on waste generated out-of-state patently discriminates against interstate commerce, because the statutory determinate for the fee is the origin of the waste); *Chem Waste*, 112 S. Ct. at 2014-15 (Alabama's additional fee for disposal of hazardous waste is imposed only on waste generated outside state, and therefore discriminates against interstate commerce); *Fort Gratiot*, 112 S. Ct. at 2026-27 (waste import restrictions of Michigan statute, which provide that solid waste generated in another county, state or country cannot be accepted for disposal unless explicitly authorized by receiving county, discriminate against interstate commerce; there is no valid health and safety reason for limiting the amount of waste received from outside the state, but not the amount received from inside the state); *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992) (Oklahoma statute requiring coal-fired electric utilities to burn mixture containing at least 10% Oklahoma-mined coal is discriminatory, because statute purports to exclude coal mined in other states based solely on its origin). *Cf. Maine v. Taylor*, 477 U.S. 131 (Maine statute prohibiting importation of live baitfish is discriminatory against interstate commerce because out-of-state baitfish are banned based on their origin; however, since nonnative species pose serious threat to native fish, Maine had legitimate reasons, apart from origin of out-of-state baitfish, for differential treatment).

to legitimate local concerns, with effects upon interstate commerce that are only incidental." *Philadelphia*, 437 U.S. at 624. The Court holds that Plaintiff has not met its burden to show that Ordinance 1501 discriminates against interstate commerce.

Application of the *Pike* Test. — The only remaining question is, therefore, whether the incidental burden placed on interstate commerce by the exclusion from "R-1" districts is "clearly excessive" to the putative local benefits. *Pike*, 397 U.S. at 142. The Supreme Court has stated that "[a] nondiscriminatory regulation serving substantial state purposes is not invalid simply because it causes some business to shift from a predominantly out-of-state industry to a predominantly in-state industry," but is only invalid "if the burden on interstate commerce clearly outweighs the State's legitimate purposes." *Clover Leaf*, 449 U.S. at 474.

A municipality such as La Porte clearly has the power impose zoning restrictions, even should interstate commerce be affected. Generally, " 'there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.' " *Hunt v. Washington Apple Advertising Commission*, 432 U.S. 333, 350 (1977) (quoting *Southern Pacific Co. v. Arizona, ex. rel. Sullivan*, 325 U.S. 761, 767 (1945)); *see supra* at 17-19 (discussing Commerce Clause challenges to zoning ordinances). Zoning is a well-established as a valid exercise of local government's police power. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1278 (5th Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989). As with

other traditional areas of local regulation, La Porte's zoning decisions must be afforded considerable deference.[27]

La Porte's exclusion of manufactured housing from "R-1" districts serves the legitimate municipal goal of preservation of property values. As noted previously, Plaintiff has presented some evidence that there may be a burden on interstate commerce resulting from La Porte's exclusion of manufactured homes from "R-1" districts. *See supra* note 22 and accompanying text. However, as a matter of law, this alleged burden, even if accepted as true, does not "clearly exceed" the substantial local benefits that result from the challenged provision of Ordinance 1501, especially when the City's zoning decisions are given their due deference.[28]

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27. *See Wood Marine*, 858 F.2d at 1066 (zoning decisions entitled to great deference); *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1079 (5th Cir. 1986) (zoning decisions afforded considerable deference). *See also Old Bridge Chemicals*, 965 F.2d at 1291 (legislation in areas of peculiarly strong state interest is subject to "very deferential review" under Commerce Clause); *Juzwin v. Asbestos Corp.*, 900 F.2d 686, 689 (3d Cir.), *cert. denied*, 498 U.S. 896 (1990) (same); *Burlington Northern Railroad Company v. Nebraska*, 802 F.2d 994, 999 (8th Cir. 1986) (state power to regulate commerce is greatest when state acts on matters of local concern); *L & L Started Pullets, Inc. v. Gourdine*, 592 F. Supp. 367, 374 (S.D.N.Y. 1984) (Sofaer, J.) (state regulations that affect interstate commerce are presumptively valid where they are exercises of traditional police powers), *aff'd*, 762 F.2d 1 (2d Cir. 1985). As the Supreme Court has stated, the factfinder in a Commerce Clause dispute "certainly [is] not authorize[d] . . . to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than . . . 'pure speculation'." *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Rock Island & Pacific R.R. Co.*, 393 U.S. 129, 139 (1968).

28. The extent of the burden on interstate commerce that will be

(Cont'd)

Appendix C

In interpreting the Commerce Clause, courts consistently have been guided by the principle that "economic protectionism" between the several states, whether in legislation's purpose or only in its effects, is prohibited. *See C & A Carbone*, 114 S. Ct. at 1682 ("[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent"); *see also Fulton Corp. v. Faulkner*, 116 S. Ct.

(Cont'd)

tolerated by the Constitution depends on " 'the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate commerce.' " *Clover Leaf*, 449 U.S. at 471 (quoting *Pike*, 397 U.S. at 142). Plaintiff has made several proposals for alternative zoning provisions that would have a "lesser impact" on interstate commerce. However, Plaintiff's proposals are not adequate. Plaintiff proposes (1) a requirement that all manufactured homes in "R-1" districts be installed on permanent foundation systems, and (2) achieving uniformity of appearance "by requiring all homes to have minimum square footage, pitched roofs, conventional siding and roofing, and the like." Plaintiff's Original Response, at 35-36. However, Janet Stevenson's affidavit states that, even though she planned to install her manufactured home on a "permanent foundation which would have been bolted or welded to piers buried deep in the ground," she also valued the option of moving her home later. Stevenson Affidavit (Exhibit B to Original Response), at 3. This evidence belies Plaintiff's argument that transience could be defeated by permanent foundation systems. Moreover, Plaintiff's proposal for "uniformity" is unspecific and thus legally insufficient. Also, some appearance requirements may be argued to involve "construction standards" which might be attacked on pre-emption grounds under the federal statute regarding HUD-code manufactured homes, 42 U.S.C. § 5401 *et seq.* *See, e.g., Georgia Manufactured Housing* decision, *supra* note 5, slip op. at 18 (holding that Spalding County ordinance's 4:12 roof pitch requirement for manufactured houses is pre-empted by federal law because it interferes with the federal statute's construction and safety requirements); *see also supra* at 2-5 (discussion of federal pre-emption).

848, 853 (1996) ("[i]n its negative aspect, the Commerce Clause prohibits economic protectionism — that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors") (internal quotation marks and citations omitted). This is not a case that implicates such protectionism. Rather, La Porte has enacted a zoning ordinance which distinguishes between different types of housing, without regard to their origins. Such legislation is well within the traditional local powers of municipalities, and its incidental effects on interstate commerce, assuming that these effects in fact exist, do not clearly exceed the benefits to the La Porte community.

Upon reconsideration, La Porte's Motion for Summary Judgment on Plaintiff's Commerce Clause claim is again granted.[29]

CONCLUSION

For the reasons stated herein, it is

ORDERED that the **Motion for Reconsideration** [Doc. # 51] is **GRANTED**. It is, however,

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29. Even if the Court were to apply the stricter scrutiny test, it appears that this result would not change. Plaintiff has presented no evidence that La Porte was motivated by economic protectionism when it enacted Ordinance 1501 excluding manufactured homes from "R-1" districts. *See Philadelphia*, 437 U.S at 626 (protectionism can reside either in legislative means or legislative ends). Furthermore, even assuming *arguendo* that Plaintiff had demonstrated discriminatory effect, La Porte has demonstrated that the exclusion of manufactured homes from "R-1" districts is justified by "a valid factor unrelated to economic protectionism" — namely, preservation of property values. *See Fort Gratiot*, 112 S. Ct. at 2024; *Cooper*, 11 F.3d at 553.

Appendix C

FURTHER ORDERED that Plaintiff's request that this Court's vacate its previous Memorandum Opinion is **DENIED**.

SIGNED at Houston, Texas this 8th day of August, 1996.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION ENTERED APRIL 2, 1996

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

CIVIL ACTION NO. H-94-1066

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Plaintiff,

v.

CITY OF LA PORTE, et al.,

Defendants.

MEMORANDUM OPINION

Plaintiff Texas Manufactured Housing Association, Inc. (hereinafter "TMHA")[1] brings this action against the City of

1. An organization such as TMHA has standing to bring an action on behalf of its members where: (1) the organization's members would have standing to sue individually; (2) the organization is seeking to protect interests that are germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the organization's members to participate in the lawsuit. *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 555 (5th Cir. 1996). Defendants have not objected to TMHA's standing. Based upon TMHA's representations in its complaint concerning the activities of its members and the purpose of its organization, the Court is satisfied that TMHA has standing to bring this action.

(Cont'd)

Appendix D

La Porte (hereinafter "La Porte" or "City") and the Zoning Board of Adjustment of the City of La Porte (hereinafter "ZBA"), arguing that La Porte's zoning scheme excludes manufactured homes in a discriminatory and unconstitutional manner. Plaintiff raises a myriad of constitutional arguments, as well as federal and state preemption arguments, and asks that Defendants be permanently enjoined and restrained from applying or enforcing Ordinance 1501 of the City of La Porte. For the reasons stated below, Defendants' **Motion for Summary Judgment** [Doc. # 13] is **GRANTED** and Plaintiff's **Request for a Permanent Injunction** [Doc. # 1] is **DENIED.**[2]

On March 28, 1996, Plaintiff filed a **Motion for Partial Summary Judgment** [Doc. # 46], requesting summary judgment on the issues of the commerce clause and federal and state preemption. Since this motion essentially repeats the arguments made in Plaintiff's Response to Defendants' Motion for Summary Judgment, it is not necessary for the Court to wait for Defendants' response. The arguments in Plaintiff's motion will be addressed together with the issues raised by Defendants' motion.

SUMMARY JUDGMENT STANDARD

In deciding a motion for summary judgment, the Court

(Cont'd)

Janet Stevenson was originally a Plaintiff in this action. However, the Court has been notified by a letter from Stevenson's counsel dated March 15, 1996, that all claims urged by Stevenson against the Defendants have been settled.

2. Plaintiff's request that this Court issue a writ of certiorari to the Zoning Board of Adjustment of the City of La Porte has been previously denied. *See* Doc. # 38.

must determine whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); *Bozé v. Branstetter*, 912 F.2d 801, 804 (5th Cir. 1990). The facts are to be reviewed with all inferences drawn in favor of the party opposing the motion. *Bozé*, 912 F.2d at 804 (citing *Reid v. State Farm Mut. Auto Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). However, factual controversies are resolved in favor of the non-movant "only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.*, 66 F.3d 89, 92 (5th Cir.), *revised on other grounds upon denial of reh'g*, 70 F.3d 26 (5th Cir. 1995).

The party moving for summary judgment has the initial burden of demonstrating the absence of a material fact issue with respect to those issues on which the movant bears the burden of proof at trial. For any matter on which the non-movant carries the burden of proof at trial, however, the movant may, by merely pointing to the absence of evidence supporting the essential elements of the non-movant's case, shift to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact so as to warrant a trial. *Transamerica Ins. Co. v. Avenell*, 66 F.3d 715, 718-19 (5th Cir. 1995); *Douglass v. United Servs. Auto. Ass'n*, 65 F.3d 452, 459 (5th Cir. 1995), *revised on other grounds*, No. 95-50007, 1996 WL 140173 (5th Cir. March 28, 1996) (en banc); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir.), *cert. denied*, 115 S. Ct. 195 (1994).

The nonmovant's burden may not be satisfied by conclusory allegations, unsubstantiated assertions, metaphysical doubt as to the facts, or a scintilla of evidence. *Douglass*, 65 F.3d at 459; *Little*, 37 F.3d at 1075. In the absence of any proof, the court will not assume that the nonmovant could or would prove the necessary facts. *McCallum Highlands*, 66 F.3d at 92; *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)). Rule 56 mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Little*, 37 F.3d at 1075 (citing *Celotex*, 477 U.S. at 322).

FACTUAL BACKGROUND

The City of La Porte has adopted Ordinance 1501, which regulates the zoning of real property situated within the corporate limits of the city. Under Ordinance 1501, the City is classified into residential zoning districts R-1, R-2, R-3, and MH. The ordinance provides that manufactured homes of any type are not permissible uses of property in the R-1, or "Low Density Residential," districts. "Industrialized" or "modular" homes,[3] in addition to conventional "site-built" homes, are permitted in R-1 districts. Plaintiff contends that the "only difference or distinction" between industrialized homes and HUD-code manufactured homes is "the building code to which they are constructed." Plaintiff further argues that some

3. The term "modular" home has the same meaning as "industrialized" home, which is defined by Texas statute. Tex. Rev. Civ. Stat. Ann. art. 5221f-1 (Vernon 1987 & Supp. 1996). Modular or industrialized homes are referred to as "blue label" homes, while HUD-code manufactured homes are called "red label" homes. Complaint, at 8.

manufactured homes are virtually identical to industrialized or site-built homes in appearance, design, function, and safety.

Janet Stevenson, formerly a plaintiff in this action, had placed and occupied a manufactured home on property which the City of La Porte annexed in 1989. As a result of the annexation, Stevenson's property became classified as R-1, but her manufactured home was allowed to remain on the property as a lawful non-conforming structure under Ordinance 1501's grandfather clause. After Stevenson's manufactured home was destroyed by fire on September 18, 1993, she applied to the City for a building permit to install a replacement HUD-code manufactured home on her property, but the City denied the permit under Ordinance 1501. *See* Exhibit A to Complaint. On or about March 24, 1994, the ZBA affirmed the City's decision.

Plaintiff alleges that the City's "obsolete and uninformed view of HUD-code manufactured housing detrimentally impacts the consumer-citizens of La Porte," as well as "the trade and commerce in manufactured housing among its various manufacturers and retailers," because their housing needs have not been given any "studied consideration." Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 17] (hereinafter "Response"), at 2.

DISCUSSION

Plaintiff has raised claims pursuant to substantive due process, equal protection, the commerce clause, procedural due process, the right to privacy, and the Civil Rights Act of 1871. Plaintiff also argues that Ordinance 1501 is preempted by federal and state law. The Court notes preliminarily that TMHA's claims in this lawsuit are strikingly similar to those made in a separate

suit filed by TMHA in the Beaumont Division of the Eastern District of Texas, in which Judge Cobb granted summary judgment in favor of Defendants as to all of TMHA's claims and dismissed the complaint. *See Texas Manufactured Hous. Ass'n v. City of Nederland*, 905 F. Supp. 371 (E.D.Tex. 1995).

Substantive Due Process

Zoning ordinances are within the police power of municipalities, and review by the courts is extremely limited. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). Local zoning ordinances violate the due process clause only if they are "clearly arbitrary and unreasonable, having no substantial relation to the public safety, morals, or general welfare." *Id.* at 395. Indeed, zoning ordinances are entitled to the same deference as state statutes, and constitutional challenges are evaluated under the rational basis test. *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165, 1167 (5th Cir. 1986); *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir.) (en banc), *cert. denied*, 477 U.S. 905 (1986). Therefore, the ordinance must be upheld if it bears a reasonable relation to a legitimate state purpose. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-25 (1978). In order to ultimately prevail, Plaintiff must show that the legislative facts on which the regulation is apparently based could not reasonably be conceived to be true by the governmental decision maker. *Vance v. Bradley*, 440 U.S. 93, 111 (1979).

TMHA argues that the City lacks a rational basis for its regulation of manufactured housing. The City has stated that the purpose of the ordinance is preservation of property values.[4]

4. Defendants' Motion for Summary Judgment [Doc. # 13] (hereinafter "Summary Judgment Motion"), at 6.

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Charles Harrington, Director of Planning for the City of La Porte, states in his affidavit that, in his professional opinion, "the placement of mobile homes in a neighborhood of conventional or industrialized housing tends to reduce the market value of the industrialized and conventional housing, to discourage the construction of additional industrialized or conventional housing, and to reduce the incentive of property owners to improve and upgrade their property." Affidavit of Charles R. Harrington (Exhibit A to Summary Judgment Motion) (hereinafter "Harrington Affidavit"), at 3.[5] Harrington further states that he believes his opinion is shared by "many other city planners," and that, in his experience, "most people view mobile homes as an inferior form of housing." *Id.* Indeed, Plaintiff's own evidence reveals that, during the public hearing concerning Ms. Stevenson's application to place a manufactured home on her lot, four persons who own homes near Ms. Stevenson's lot spoke and all stated that they wanted Ordinance 1501 upheld because they believe that mobile homes or "house trailers" devalue their property.[6]

Defendants proffer several rational bases for Ordinance 1501's restriction on the location of manufactured homes. First, both mobile homes and HUD-code manufactured homes are constructed on a permanent chassis, and therefore can be more easily relocated. Vernon Henry, president and chairman of the

5. Plaintiff has objected to the Harrington Affidavit and asks that it be stricken in whole or in part, because it is based on belief rather than personal knowledge and because it contains improper "expert" opinion. Response, at 12-13. The Court finds this attack unpersuasive and holds that the Harrington Affidavit is admissible in support of Defendants' summary judgment motion.

6. Transcript of Public Hearing and Regular Meeting of the La Porte Zoning Board of Adjustment, March 23, 1994 (Exhibit L to Response) (hereinafter "ZBA Transcript"), at 48-56.

urban planning firm which assisted La Porte with updates of its comprehensive zoning plan, states that the ability for manufactured homes to be moved creates "the perception (as well as the reality, in many cases) of the owner as well as the neighbors . . . that they may well be later moved." Preliminary Report of Vernon G. Henry, A.I.C.P., C.R.E. [Doc. # 41] (hereinafter "Henry Report"). Mr. Henry states that this mobility results in an uncertainty which, in combination with other factors, depreciates neighboring property values. *Id.* This opinion is echoed by Harrington, who states that owners of transportable homes "may not feel the same sense of commitment to the community and may be less likely to invest in upgrading their property through landscaping and the construction of other improvements." Harrington Affidavit, at 2-3.[7]

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7. TMHA responds that this argument is a red herring, since Ms. Stevenson's proposed home was to have been placed on a permanent foundation system "which would have been bolted or welded to piers buried deep in the ground," and the City has allowed site-built homes to be taken up off their foundations and transported. Plaintiff's Supplemental Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 43] (hereinafter "Plaintiff's Supplemental Response"), at 8-9; Affidavit of Janet A. Stevenson (Exhibit B to Response), at 3; Deposition of Mark S. Lewis, Chief Building Official for City of La Porte (Exhibit J to Response), at 137-38. TMHA also argues that manufactured homes are rarely moved and therefore that the ordinance does not in fact serve to reduce transience. Plaintiff's Supplemental Response, at 8; Affidavit of Welford Sanders (Exhibit F to Response), at 3.

Even assuming that these arguments are accurate, they are not sufficient to invalidate the rational basis proffered by Defendants. The Supreme Court has stated clearly that, under the rational basis test, perfection in classification is not required; indeed, imperfection in classification is in turn rationally related to the secondary objective of legislative convenience. *Vance*, 440 U.S. at 108-09; *Horizon Concepts*, 789 F.2d at 1167.

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Moreover, Defendants argue that the appearance of manufactured homes differs from other types of housing, and therefore that the distinction in Ordinance 1501 has a rational basis. They point out that, since manufactured homes are fully constructed in one location and transported to another location for use or sale, they must be constructed to an appropriate width or length to travel the roads. Mr. Harrington states that homebuyers tend to prefer neighborhoods where the houses are of a similar type and size, as is "demonstrated in the market place where large planned developments which pay careful attention to the construction of neighborhoods of architecturally compatible housing have had great success in attracting buyers." Harrington Affidavit, at 3; *see also* Henry Report, at 2.[8] The Defendants' experts also state that manufactured housing is "easily distinguishable" from other types of housing. Henry Report, at 2; Harrington Affidavit, at 2 ("basic rectangular shape and flat roof design of many mobile home[s] give them a distinctive appearance that identifies them as mobile homes even when additional skirting and trim is added").[9]

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8. Defendants also proffer the expert report and affidavit of Charles A. Smith, Ph.D., who renders his opinion "that zoning in general tends to preserve residential property values, and furthermore that manufactured housing should be restricted to an area zoned for that specific type of structure." Report of Charles A. Smith [Doc. # 41], at 1. While Dr. Smith states that it is his opinion that prohibiting manufactured housing in La Porte's R-1 districts generally promotes preservation of property values in La Porte, he has not conducted a detailed study and analysis of the City; his opinion is based on his "historical research into manufactured housing and mobile home parks," as well as his appraisal experience and study of La Porte's zoning map. *Id.*

9. Plaintiff's argument that the City's actions are arbitrary because the characteristics of other types of homes are not regulated is unavailing since, as stated previously, legislative classifications need not be perfect. *Vance*, 440 U.S. at 108-09; *Horizon Concepts*, 789 F.2d at 1167.

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In the past, the courts have upheld rationales similar to La Porte's. *See, e.g., City of Brookside Village v. Comeau*, 633 S.W.2d. 790 (Tex. 1982), *cert. denied*, 459 U.S. 1087 (1982) (regulation of mobile home parks and restriction of location of mobile homes is a valid exercise of a municipality's police power); *Grant v. Seminole County, Fla.*, 817 F.2d 731 (11th Cir. 1987); *Horizon Concepts, Inc. v. City of Balch Springs*, 789 F.2d 1165 (5th Cir. 1986). Nevertheless, "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases" for differential treatment. *City of Cleburne, Tx. v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).

TMHA argues that, if there were ever grounds for exclusion of manufactured housing, such grounds no longer exist because manufactured housing has changed significantly in recent years, and particularly since the *Comeau* case was decided. First, TMHA states that, since 1982, several studies have been conducted across the country which have analyzed the issue of property values and these studies have uniformly concluded that property values are unaffected by the presence of manufactured homes.[10] Furthermore, Plaintiffs maintain that no

10. Supporting Affidavit of Will Ehrle, President and General Counsel of TMHA (Exhibit E to Response) (hereinafter "Ehrle Affidavit"), at 7-8 (a 1990 study sponsored by the Michigan Department of Commerce and conducted by a team of researchers from the University of Michigan concluded that property values of conventional site-built homes are not diminished by adjacent development with HUD-code manufactured housing; other studies from New Hampshire, California, North Carolina and Georgia, whose dates are not specified, reached the same conclusion). *See also* Supporting Affidavit of Waldo S. Luedemann, Jr., Texas State Certified General Appraiser (Exhibit D to Response), at 9. Mr. Luedemann was commissioned by Plaintiffs to study property values in La Porte and concluded that, among other things, placement of a HUD-code manufactured home on Stevenson's lot would not have a negative impact on surrounding property values.

studies exist which support Defendants' assumptions.[11] However, whether or not Defendants cite studies supporting their position is not dispositive on the question of whether their position is legally sufficient as a rational basis.

Second, TMHA argues that, because of continuing advancements and enhancements fortified by a stringent federal building code,[12] the general "assumptions" about manufactured housing are no longer factually correct, if they ever were. While in 1982 there were many differences in the exterior appearances of manufactured homes and site-built homes, many HUD-code manufactured homes built today "bear a striking resemblance" to site-built homes and may possess such conventional features as pitched roofs, brick and wood facades, fireplaces, bay

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11. Supporting Affidavit of Welford Sanders (Exhibit F to Response) (hereinafter "Sanders Affidavit"), at 7 (Mr. Sanders states that he has "studied the manufactured housing industry for years, and [is] personally unfamiliar with any study which reaches the biased and prejudiced conclusions voiced by Mr. Harrington"); Ehrle Affidavit, at 7.

Defendants stated in their interrogatory answers that they could cite no studies supporting their position. City of La Porte's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production (Exhibit M to Response), at 8 ("[t]he City admits that, to the knowledge of its current officials, it does not have any written studies, correspondence, or reports which specifically address the benefits of the classifications at issue"). Neither the City nor the ZBA commissioned its own study to address the impact of placing manufactured homes in the R-1 district. *Id.* at 25; ZBA's Responses to Plaintiffs' First Set of Interrogatories, Requests for Admissions, and Requests for Production (Exhibit N to Response), at 21.

12. There have also been changes in the HUD code since 1982 which impose more stringent requirements of durability and energy efficiency on manufactured homes. Ehrle Affidavit, at 4.

windows, permanent foundations, and attached garages. Ehrle Affidavit, at 3-4; Welford Sanders, *Regulated Manufactured Housing* (Exhibit H to Response), at 2, 10-11, 34-35 (photographs of HUD-code manufactured houses). Charles Harrington, in his deposition, also agreed that manufactured housing has greatly improved in recent years. Deposition of Charles R. Harrington (Exhibit K to Response), at 140-143. Nevertheless, as TMHA stated during oral argument before this Court on October 10, 1995, the appearance of HUD-code manufactured homes can vary widely. Evidence that "many" HUD-code homes are similar to conventional homes and that they "may" possess conventional features is little assurance that all or even most HUD-code manufactured homes will have an appearance comparable to conventional homes.

Accepting as true all of Plaintiff's evidence concerning the quality of manufactured housing and the recent vast improvements in the industry, the Court finds that there is no genuine issue of material fact on this claim. Defendants have presented several rational bases for the exclusion of HUD-code manufactured homes from the City's R-1 districts, as well as supporting facts and expert opinions. The Court is persuaded that, as a matter of law, Defendants' explanations suffice as a rational basis for the exclusion and that Plaintiff's evidence of differences of opinion on these rationales is insufficient to create a genuine issue of material fact. Therefore, summary judgment is granted on Plaintiff's substantive due process claim.

Equal Protection

Plaintiff argues that its equal protection claim must be judged under different standards than its substantive due process claim because Ordinance 1501's differential treatment of

manufactured homes and modular/industrialized homes is subject to intermediate scrutiny under the equal protection clause. The Court finds this argument to be wholly unpersuasive. Although Plaintiff argues that higher scrutiny is warranted because manufactured housing is "politically unpopular," ownership of manufactured housing clearly does not qualify as a suspect classification under equal protection jurisprudence. Moreover, even if the right to shelter were recognized as a fundamental constitutional right, the connection between the right to shelter and the location of manufactured housing is too attenuated to trigger a higher standard of review.

Plaintiff's equal protection claims therefore will be evaluated under the rational basis test. *See Horizon Concepts*, 789 F.2d at 1167. For the reasons cited in the discussion of Plaintiff's substantive due process claims, the Court finds that no genuine issue of material fact exists as to this claim. Therefore, summary judgment is granted as to Plaintiff's equal protection claim.

Federal Preemption

TMHA argues that Ordinance 1501's restriction on the location of HUD-code manufactured homes is preempted by the National Manufactured Housing Construction and Safety Standards Act, 42 U.S.C. § 5401 *et seq.*, and specifically by the following language:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue

> in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d).

While this federal statute has preempted the manufactured housing field as to construction, safety, and installation, nothing in the statute creates a conflict with Ordinance 1501's regulation of the *location* of mobile homes. *See City of Brookside Village v. Comeau*, 633 S.W.2d 790, 796 (Tex. 1982). TMHA's argument that the ordinance is preempted because the "exclusion of HUD-code manufactured homes from R-1 districts is a thinly veiled attempt to impose tougher safety and construction standards on HUD-code manufactured homes," Response, at 50, is merely an unsupported assertion and is insufficient to defeat a motion for summary judgment. *See Little*, 37 F.3d at 1075.[13] Moreover, even accepting *arguendo* Plaintiff's assertion that the only material difference between modular homes and manufactured homes is the relevant building code standards, this does not support Plaintiff's conclusion that Ordinance 1501 has the effect of imposing La Porte's building code on

13. Plaintiff's only arguments on this point are that the City "cannot point to any legitimate reasons for treating HUD-code manufactured housing differently than other types of single-family housing," and that the homes permitted in R-1 districts are those constructed to state building codes while those banned in R-1 districts are built to a federal code. These statements, even if true, lend no support to Plaintiff's argument that Ordinance 1501 is an attempt to regulate safety and construction standards.

manufactured housing.[14] Indeed, rather than imposing certain local standards on manufactured homes, the City has simply banned them from R-1 districts. *Cf. Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988) (ordinance, which provided that mobile homes in residentially-zoned regions must meet construction and safety requirements other than those specified by HUD, is preempted by federal statute; city could, however, exclude mobile homes from residential region). Therefore, summary judgment in favor of Defendants is granted on the federal preemption claim. Plaintiff's motion for summary judgment on this claim is denied.

State Preemption

TMHA argues that Ordinance 1501 is unenforceable because it is in conflict with Texas' Manufactured Housing Standards Act. Tex. Rev. Civ. Stat. Ann. art. 5221f (Vernon 1987 & Supp. 1996).[15] Specifically, TMHA points to the following provision:

> An incorporated city may prohibit the installation of a mobile home for use or occupancy as a residential dwelling within its corporate limits. Any such prohibition must be prospective and shall not apply to a mobile home previously legally permitted

14. *See* Plaintiff's Motion for Partial Summary Judgment [Doc. # 46] (hereinafter "Plaintiff's Summary Judgment Motion"), at 13-15.

15. Ordinances may not contain any provision which is inconsistent with the general laws of the State of Texas. Tex. Const. art. XI, § 5; *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

> and used or occupied as a residential dwelling within the city. Permits for such use and occupancy must be granted by an incorporated city for the replacement of a mobile home within its corporate limits with a HUD-code manufactured home.

Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A(a). TMHA argues that this provision demonstrates that the state legislature "has deemed it advisable to give owners of manufactured housing the unfettered right to replace their abodes with HUD-code manufactured housing." Response, at 51-52; *see also* Plaintiff's Summary Judgment Motion, at 15-17.

TMHA's reading of Section 4A is flawed. The provision clearly allows for the replacement of "mobile homes" with "HUD-code manufactured homes," so as to encourage the replacement of substandard housing. "Mobile homes" are defined by the statute as structures built before June 15, 1976, where as "HUD-code manufactured homes" are defined as structures built on or after June 15, 1976 and according to the rules of the United States Department of Housing and Urban Development. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f, §§ 3(1) & 3(19). However, no language in the provision grants a person such as Ms. Stevenson the "unfettered right" to replace her home with a HUD-code manufactured home, especially given that the home Ms. Stevenson sought to replace was not a "mobile home" but a "HUD-code manufactured home." Moreover, the subsequent section of Article 5221f confirms the legislature's intent to permit cities to prohibit HUD-code manufactured homes in certain districts. Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A(b) ("[u]pon application the installation of HUD-Code manufactured homes shall be permitted as residential dwellings *in those areas determined appropriate by the city*") (emphasis added).

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Since TMHA has failed to demonstrate any genuine issue of material fact as to the issue of state preemption, summary judgment in favor of Defendants is granted. Plaintiff's summary judgment motion is denied.

Commerce Clause

TMHA argues that Ordinance 1501 violates the Commerce Clause of the United States Constitution.[16] Specifically, TMHA argues that the ordinance prefers intrastate commerce over interstate commerce because modular/industrialized homes which are sold in Texas are constructed in Texas by a "distinctly local industry,"[17] whereas HUD-code manufactured housing is constructed in other states as well as in Texas and is "by design and in practice, interstate in nature." Response, at 33-34; Affidavit of Will Ehrle (Exhibit E to Response), at 3, 5-6.

Actions that "burden interstate commerce or impede its free flow" are within the domain of the Commerce Clause. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677, 1681 (1994); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981). The first step in Commerce Clause analysis is to determine whether the regulation regulates evenhandedly with

16. U.S. Const., art. I, § 8, cl. 3 ("[t]he Congress shall have Power . . . [t]o regulate Commerce . . . among the several states"). The Commerce Clause not only grants power to Congress but also limits the power of state and local governments to discriminate against interstate commerce. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 114 S. Ct. 1677 (1994); *Wyoming v. Oklahoma*, 112 S. Ct. 789, 800 (1992).

17. Will Ehrle, President and General Counsel of TMHA, states in his affidavit that, to his knowledge, "no manufacturer outside of Texas is constructing and shipping industrialized/modular housing for sale in Texas." Affidavit of Will Ehrle (Exhibit E to Response), at 6.

only incidental effects on interstate commerce, or discriminates against interstate commerce. *Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 854 (1996); *Oregon Waste Systems v. Dep't of Envtl. Quality*, 114 S. Ct. 1345, 1350 (1994). Discriminatory effect, as well as discrimination on the face of the regulation, is prohibited. *C & A Carbone*, 114 S. Ct. at 1684; *Cooper v. McBeath*, 11 F.3d 547, 553 (5th Cir.), *cert. denied*, 114 S. Ct. 2675 (1994). Nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Oregon Waste*, 114 S. Ct. at 1350.

HUD-code manufactured homes are permitted in all residential districts of the City other than R-1 districts. Response, at 34. Plaintiff's argument that the ordinance's restriction has a substantial effect on interstate commerce because it "restricts the flow of HUD-code manufactured homes into the City's R-1 districts," Response, at 37, is unavailing because, as Plaintiff's argument implicitly concedes, HUD-code manufactured homes are not banned from the City, but only from its R-1 districts.

The Court finds that Ordinance 1501 regulates evenhandedly and that, since HUD-code manufactured homes may flow freely into La Porte, there is only an incidental effect, if any, on interstate commerce. *See Fulton Corp.*, 116 S. Ct. at 854; *C & A Carbone*, 114 S. Ct. at 1681. Moreover, although Plaintiff has provided some evidence in support of its claim that interstate commerce is burdened,[18] there is no basis for a

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18. Plaintiff has proffered evidence that the manufactured housing industry has suffered lost sales in the City of La Porte due to restriction on placement of manufactured homes. Plaintiffs' Supplemental Response in Opposition to Defendants' Motion for Summary Judgment [Doc. # 43], at 5; Affidavit of Gordon H. Otto and attachments (Exhibit O to Supplemental Response). Given the large number of obvious variables that may affect sales of HUD-code homes, this evidence is not necessarily probative.

conclusion by this Court that any such burden is "clearly excessive" in relation to the local benefits that result from a general zoning ordinance restricting the location of manufactured homes. *See Oregon Waste*, 114 S. Ct. at 1350; *see also* Henry Report (reciting reasons for exclusion of manufactured homes from La Porte's R-1 districts); Harrington Affidavit (same).

Plaintiff has failed to demonstrate any genuine issue of material fact on this issue.[19] Therefore, summary judgment in favor of Defendants is granted on Plaintiff's Commerce Clause claim. Plaintiff's motion for summary judgment is denied.

Takings and Procedural Due Process Claims

The complaint in this action alleges that Ordinance 1501, as applied by Defendants to Janet Stevenson, violates the "takings" clauses of the federal and state constitutions. Complaint, at 12. The Court has been informed by a letter from Stevenson's counsel, dated March 15, 1996, that all claims urged by Stevenson against the Defendants have been settled after mediation. Therefore, the takings claims urged by Plaintiff are **DISMISSED AS MOOT.**[20]

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19. The Court is similarly unpersuaded by Plaintiff's argument that regional jealousies and retaliatory measures, which the commerce clause is designed to protect against, could result if HUD-code homes from other states are not given "free access" to the market of La Porte and other cities in Texas.

20. While the Court does not conclusively decide the takings issue, it appears that Plaintiff's takings claim fails because the zoning ordinance substantially advances legitimate state interests. *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Agins v. City of Tiburon*, 447 U.S. 255, 260-

(Cont'd)

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Privileges and Immunities Clause/Right to Travel

TMHA argues that the Ordinance 1501 impermissibly restricts its constitutional right to travel. A law implicates the right to travel when it actually deters such travel, when impeding travel is its primary objective, or when it uses any classification which serves to penalize the exercise of the right. *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Plaintiff argues that the ordinance actually deters and penalizes travel because HUD-code manufactured homes, which are more affordable than either modular/industrialized homes or conventional site-built homes, are prohibited in La Porte's R-1 districts. As a result, Plaintiff states, "persons desiring a residence in the City of La Porte, both current and new residents alike, face dramatically increased housing costs . . . [that] force low- to moderate-income persons to either abandon their rights to reside in the City of La Porte . . . or to pay the tax and toll demanded by the City of La Porte for the alleged maintenance of someone else's 'property values.' " Response, at 54-55.

(Cont'd)

63 (1980). Moreover, it appears that the alleged reduction of Stevenson's property value due to Ordinance 1501's ban on manufactured homes fails to constitute a sufficiently significant economic deprivation to create a compensable taking. *Dolan*, 114 S. Ct. at 2316; *Agins*, 447 U.S. at 260-63. *See also* 2 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 15.12, at 97 (Supp. 1996) ("[u]nder the case-by-case approach of the Supreme Court, it appears that a lower court should not find that a general property regulation resulted in a taking of property unless the property owner demonstrates that the regulation has resulted in a severe economic loss to the property owner and that the government action is not rationally related to any legitimate governmental interest"). Stevenson clearly has not been deprived of all economically viable uses of her land. *See Tex. Manufactured Hous. Ass'n v. City of Nederland*, 905 F. Supp. 371, 378 (E.D. Tex. 1995).

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As noted in the analysis of Plaintiff's commerce clause claim, HUD-code manufactured homes, while prohibited in La Porte's R-1 districts, are permitted elsewhere in the City. Ordinance 1501 does not penalize exercise of the right to travel between states, or even between La Porte and other municipalities, because those preferring HUD-code manufactured homes may erect and reside in them within the City of La Porte. Since Plaintiff has failed to demonstrate any genuine issue of material fact as to the right to travel, summary judgment is appropriate in favor of Defendants on this claim.[21]

Right to Privacy

A person's most intimate and personal choices, such as marriage, procreation, contraception, and family relationships, are constitutionally protected from government intrusion. *See, e.g., Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977). Plaintiff argues that, since many of these activities occur in one's home, the "style and form of one's own house falls within the boundaries of the zone of privacy outlined and protected by the Supreme Court." Response, at 57. Plaintiff has also asserted that an ordinance which prohibits HUD-code manufactured homes in one district of the City constitutes an "intrusive regulation of the family." Response, at 59. The Court finds this argument frivolous. The authorities cited by Plaintiff do not

21. Plaintiff's complaint asserts the right to travel as guaranteed by the Texas Constitution, as well as by the Privileges and Immunities Clauses of the U.S. Constitution, U.S. Const. art. IV & Am. 14. Since Plaintiff has presented no authority or argument suggesting that any right to travel that exists under the Texas Constitution should be analyzed under different standards than the federal constitutional right, summary judgment as to the state constitutional claim is also granted.

support such an unprecedented extension of the constitutional right to privacy. Summary judgment in favor of Defendants is granted on this claim.

Civil Rights Act of 1871

TMHA brings its constitutional and preemption claims pursuant to the Civil Rights Act of 1871, codified at 42 U.S.C. § 1983.[22] Section 1983 creates no substantive rights in itself, but provides a remedy for violation of the Constitution or federal laws. Given that summary judgment has been granted in favor of Defendants on all of Plaintiff's claims, summary judgment on Plaintiff's Section 1983 claim is also granted.

CONCLUSION

The Court has given serious consideration to all arguments presented by the parties, and has perused the record carefully. Plaintiff's recent motion demonstrates no genuine issue of material fact whatsoever. It is hereby

ORDERED that Defendants' **Motion for Summary Judgment** [Doc. # 13] is **GRANTED**. It is further

ORDERED that Plaintiff's **Motion for Partial Summary Judgment** [Doc. # 46] is **DENIED**. It is further

ORDERED that Plaintiff's **Request for a Permanent Injunction** [Doc. # 1] is **DENIED**.

---

22. 42 U.S.C. § 1983 provides for liability for "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage," subjects another to "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."

Appendix D

SIGNED at Houston, Texas, this 1st day of April, 1996.

s/ Nancy F. Atlas
NANCY F. ATLAS
UNITED STATES DISTRICT JUDGE

APPENDIX E — RELEVANT GUIDELINES AND POLICY STATEMENTS OF THE DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 3282

[Docket No. FR-4192-N-01]

Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption

AGENCY: Office of the Assistant Secretary for Housing — Federal Housing Commissioner, HUD.

ACTION: Notice of staff guidance.

SUMMARY: The Office of Consumer and Regulatory Affairs in HUD has developed guidelines to assist its staff in addressing preemption issues concerning the National Manufactured Housing Construction and Safety Standards Act of 1974. Because of the interest of outside persons in the subject generally, HUD has decided to publish these internal guidelines to assist regulated entities and consumers in understanding the guidelines under which HUD will be operating. These guidelines are not binding on either HUD or the public and are published for informational purposes only.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, Room 9156, 451 Seventh Street, SW., Washington, DC 20410-0500; telephone (202) 708-6401, or on e-mail through Internet at

David__R.__Williamson@hud.gov. For hearing and speech-impaired persons, the telephone number may be accessed via TTY (text telephone) by calling the Federal Information Relay Service at 1-800-877-8339. (Other than the "800" number, these telephone numbers are not toll-free).

SUPPLEMENTARY INFORMATION: The staff guidelines reproduced in this notice are internal guidance to assist the HUD office administering the manufactured housing program in answering questions from the public as to whether particular State or local laws or regulations are preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (the Act). The guidelines are based upon the Act and its implementing regulations in 24 CFR parts 3280, 3282, and 3800 and do not provide new interpretations of the Act or create new HUD policy. The guidelines were developed to assist HUD staff in giving uniform and timely responses to the public, including consumers and affected industries, and State and local governments on preemption issues.

HUD is publishing these guidelines because of the interest in preemption questions that has been expressed by members of these groups. HUD welcomes comments on these guidelines. Anyone wishing to comment on these guidelines may do so by submitting written comments to the attention of the person listed in the "For Further Information Contact" section of this notice.

The internal guidelines that were prepared are as follows:

Appendix E

Guidelines for Analyzing Situations Involving Preemption Under the Manufactured Home Construction and Safety Standards Act

I. Introduction

These guidelines have been prepared to assist in answering questions from the public as to whether particular State or local laws or regulations are preempted by the Act. These guidelines are based upon the National Manufactured Housing Construction and Safety Standards Act and its implementing regulations and are not intended to add new interpretations to the Act or to create new HUD policy.

II. Statutory And Regulatory Background

The Act establishes a national set of construction standards for manufactured housing. To ensure that State or local governments did not enact or allow to continue conflicting construction standards, Congress provided that no State or local government could establish a standard dealing with an aspect of performance that is not identical to those standards established under the Act (section 604(d)). However, where there is no Federal standard. the States are free to act (section 623(a)).

HUD has interpreted these statutory provisions in its regulations implementing the Act (24 CFR 3282.11). In accordance with the Act, the regulation bars States from imposing a manufactured home standard regarding construction and safety that covers the same aspects of performance governed by a Federal standard. More generally, States may not take any action that could interfere with the Federal superintendence of the industry as established by the Act (24 CFR 3282.11).

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The Act does not impose a duty on HUD to make any determinations as to the applicability of the preemption provision, to investigate preemption issues, or to render advisory opinions regarding preemption questions. Further, a State is not specifically prohibited under section 610 of the Act from implementing a provision that is preempted, nor is there any requirement under the Act for the Secretary to enforce the preemption provision. Generally, enforcement of preemption requirements is left up to the Courts. Where an issue is unclear, it is appropriate for the Courts to decide whether a State or local requirement is preempted.

To the extent possible, HUD wishes to be responsive to inquiries of consumers, the industry, and State or local governments on the applicability of preemption. These responses should be considered as an effort by HUD to advise the public of its construction of the statute and the rules which it administers, and to give its opinion as to the applicable law and the particular facts.

III. Guidelines for Specific Situations

Most inquiries can be responded to merely by discerning if there is a specific Federal standard which addresses the same aspect of performance as the State standard. If so, the Federal law preempts the State law. In a significant number of cases, however, the determination is not as clear and requires either an engineering or legal analysis, or both. There are four general areas of inquiry which are frequently raised:

A. Installation

There is no specific Federal standard that deals with the

installation of manufactured homes. As such, standards as to the installation of manufactured homes can be regulated by local or State governments and are not preempted under the Act.

It is possible, however, that a local installation rule may hinder the implementation of Federal standards. For example, the implementation of a local rule may conflict with a requirement of a Federal construction standard for plumbing or water hookup. In such cases, the local rule is preempted.

B. Zoning

Normally, zoning issues fall outside the scope of the preemption provisions of sections 604 of the Act. There may be limited instances, however, in which the Federal definition of "manufactured home" could fall within the broad definitions applied to prefabricated or factory built homes under the local zoning ordinance. Such homes are treated differently depending on the building code under which they are constructed.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such enforcement rests on the locality's right to determine proper land use. In addition, a locality is free to adopt and enforce ordinances that regulate the appearance and dimensions of homes so long as the criteria established by such ordinances do not have the effect of excluding manufactured homes based on the construction and safety standards to which they were built. Such regulation of aesthetics protects property values, preserves the character and integrity of communities and neighborhoods, and assures architectural compatibility.

Appendix E

If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks such authority. Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards. By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.

A locality is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Federal definition of Manufactured Homes the same under local zoning laws.

C. State Enforcement

A number of questions have arisen as to when a State's enforcement of manufactured housing standards are preempted by Federal law. HUD's regulations at 24 CFR 3282.11(c) and (d) set forth a clear standard as to the appropriateness of State enforcement of its manufactured home standards. The Federal regulations prohibit a State from establishing a code enforcement system for manufactured homes which is outside, or goes beyond, those enforcement procedures specifically set forth in the Federal regulations. "The test of whether a State rule or action is valid or must give way is whether the State rule can be enforced, or the action taken, without impairing the Federal superintendence of the manufactured home industry as

established by the Act" (24 CFR 3282.11(d)). There are several specific situations:

1. A State, as a State Administrative Agency (SAA) under section 623 of the Act, can enforce the Federal standards. It may also enforce State standards which are identical to the Federal standards. Such actions would not be preempted. However, the State's system of enforcing these standards must be identical to the enforcement procedures in the Federal regulations. "No State may establish * * * procedures or requirements * * * which * * * require remedial actions which are not required by the Act and the regulations" (24 CFR 3282.11(c)).

2. A State may enforce its own consumer protection or warranty laws as to defects in individual homes. As such, a State may require a manufacturer to correct noncompliances and defects in response to individual consumer complaints. Such acts would not be preempted by Federal law (24 CFR 3282.11(d)).

3. Notwithstanding the above, however, there are limitations on a State's actions to correct individual homes. These are situations in which State action would interfere with Federal superintendence of the manufactured home industry.

(a) *Imminent safety hazards or serious defects.* Where it appears that there is an imminent safety hazard or a serious defect, the State is required to refer the matter to HUD for enforcement (24 CFR 3282.405(b) and 3282.407(a)).

(b) *Class of manufactured homes.* Where it appears that the same defect exists in a class of manufactured homes and the

State is *not* the State in which the homes were produced, then the State is required to refer the matter to the SAA in the State in which the homes were produced or to HUD (if there is no SAA in the State of production) for enforcement. Further, if a class of defective homes is produced in more than one state, HUD is responsible for the enforcement actions. If the homes were all manufactured in the State, the State may take actions, consistent with the Federal regulations, with regard to the noncompliance and defects (24 CFR 3282.405(b) and 3282.407(a)(3)).

(c) *Prior HUD enforcement.* Where HUD has already taken action to have a class of serious defects corrected, then the State is preempted from taking corrective actions of its own pursuant to the Act (24 CFR 3282.404(e)).

D. Utility Companies

There have been a few utility companies which have attempted to impose their own construction or safety standards on manufactured homes as a requirement for connection to their services. The Act, by its express terms, prohibits only "State or political subdivisions of a State" from establishing standards that conflict with the Federal standards (section 604(d)). Accordingly, if the utility company is owned or controlled by a political subdivision, its standards are preempted by the Federal standards. If the utility is privately owned, its standards would not be preempted.

E. State Construction and Safety Standards

1. *Aspects of performance.* Additional questions arise in situations in which the State or locality attempts to apply its

own building or safety code to the manufactured home. Under section 604 of the Act, State law is preempted whenever there is a State performance standard regarding construction and safety that is not identical to an established Federal standard. On the other hand, section 623 of the Act provides that Federal law does not preempt State construction or safety standards for which a Federal standard had not been established. Thus, for there to be Federal preemption, there must be a specific aspect of a Federal performance standard which duplicates a local standard.

Federal preemption cannot be based upon a general purpose of the Act, or the need for national uniformity in the manufactured housing industry. The courts have applied this "aspect of performance" standard in analogous situations by focusing not on the purpose or scope of the Act, but, rather, on the specific requirements of an established Federal standard. If the Federal standard is encompassed or impacted by the State requirement, the State law is preempted.

2. *Superintendence.* It is also possible that a State or local law may be preempted even though the local rule does not meet the differing aspect of performance standard. As stated above, 24 CFR 3282.11(d) sets forth an additional standard of preemption. A State rule must give way if it impairs the Federal superintendence of the manufactured home industry as established by the Act.

Thus, for example, a local requirement that all homes be constructed on site, while not covering any aspect of performance, would be so fundamentally in conflict with the Federal standards as to impair the Federal superintendence of the manufactured home program. Such a requirement would be preempted under the HUD regulations.

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The scope of this regulatory provision is limited by the language "as established by the Act". This language limits the Federal superintendence of the industry, since section 604(d) of the Act limits the preemption of standards to only those issues dealing with the same aspects of performance.

Authority: 42 U.S.C. 3535(d) and 5401 et seq.

Dated: January 14, 1997.

Stephanie A. Smith,

General Deputy, Assistant Secretary for Housing-Federal Housing Commissioner.

* * *

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 3280 and 3282

[Docket No. FR-4223-N-01]

Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Statement of policy.

SUMMARY: This Statement of Policy provides notice to the

public concerning HUD's application of the National Manufactured Housing Construction and Safety Standards Act of 1974 (Act) to certain zoning decisions being made by State or local government. These cases typically involve State or local actions to prohibit the siting of HUD-code manufactured housing while permitting the siting of other types of manufactured housing built to State or local building codes.

If a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the Act, the locality is without authority to do so. This Statement of Policy is being provided to clarify and distribute HUD's existing policy determination concerning this matter.

FOR FURTHER INFORMATION CONTACT: David R. Williamson, Director, Office of Consumer and Regulatory Affairs, Department of Housing and Urban Development, 451 7th St. SW, Room 9152, Washington, D.C. 20410-8000), telephone number (202) 708-6409 (this is not a toll-free number). For hearing-and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1-800-877-8339.

SUPPLEMENTARY INFORMATION:

I. Background

Over the last few years, HUD has received a number of questions concerning the application of the Federal preemption authority in the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 U.S.C. 5401-5426) (Act)

to actions by State or local government. HUD recently published a nonbinding notice of staff guidance, which it hoped would assist the public on some of these questions (62 FR 3456, January 23, 1997).

In certain cases involving questions of preemption and zoning, the State or local government is imposing more limitations on the placement of manufactured homes that are built to the Federal manufactured home construction and safety standards (24 CFR part 3282) (Federal standards) than on other types of factory-built single family housing. In the past, HUD has sent letters to various communities in such cases, where local zoning laws are in direct conflict with the Federal Act and regulations.

II. Increasing Homeownership and the Supply and Availability of Affordable Housing

The elimination of barriers to the expanded use of affordable housing, including manufactured homes, has been one of the primary objectives of the President's National Homeownership Strategy. HUD coordinates the National Partners in Homeownership, which now has over 60 national organizations participating, including State, county and local governments, and other groups, to identify and promote ways to increase homeownership and the supply of affordable housing. The Strategy includes the following goals and objectives in Action Item 27:

- The partnership should identify and promote zoning and land development policies that are more conducive to manufactured housing. As part of this initiative, partners should develop model legislation for States and localities

to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification (manufacturer certification that the home has been constructed to the Federal standards).

- The partners also should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

HUD strongly endorses this Action Item, particularly making available sites for manufactured housing outside of parks and largely rural areas. On March 22, 1996, the Manufactured Housing Institute (MHI) and the American Planning Association (APA) convened a National Partners in Homeownership Forum to discuss zoning and other issues. The Forum drew over 100 attendees including planners, housing-advocacy organizations, and representatives from the manufactured housing industry.

The attendees reached an almost unanimous consensus that very real zoning and other regulatory barriers exist that significantly hinder the full use of manufactured housing. The Forum produced a series of recommendations to HUD and the National Partners in Homeownership, including APA and MHI.

This Statement of Policy is being issued as an initial step toward the elimination of barriers to the use of manufactured housing and in furtherance of the goals and objectives of the National Homeownership Strategy.

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III. Requirements of Act and Regulations

Section 604(d) of the Act, 42 U.S.C. 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority * * * to establish, * * * with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

The term "manufactured home" is defined in section 603(6) of the Act, 42 U.S.C. 5402(6). In addition, Sec. 3282.11(d) of the Manufactured Home Procedural and Enforcement Regulations (24 CFR part 3282) prohibits any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Conversely, section 623(a) of the Act (42 U.S.C. 5422(a)) provides:

> Nothing in this [Act] shall prevent any State agency or court from asserting jurisdiction under State law over any manufactured home construction or safety issue with respect to which no Federal manufactured home construction and safety standard has been established. * * *

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IV. Statement of Policy 1997-1

Generally, the adoption and enforcement of a local zoning ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Act because such actions are exercises of the locality's authority to determine proper land use. Under section 604(d) of the Act (42 U.S.C. 5403(d)), however, the locality is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction and safety code that is different from the Federal standards prescribed under the Act.

For example, assume two structures are brought into a locality and both structures are: 320 or more square feet when erected on site; built on a permanent chassis; and transported in one or more sections. If the locality only allows the structure that is built to the State or local building code to be sited outside an approved mobile home park, the locality would be acting without authority. If under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a "Manufactured home" (42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act.

Therefore, a locality cannot exclude or restrict manufactured homes that meet the Federal standards if the locality accepts manufactured homes meeting other standards. By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards. To the extent that the provisions or enforcement of local zoning regulations require that manufactured homes meet standards

other than the Federal standards for manufactured homes, those local actions are preempted by section 604(d) of the Act (42 U.S.C. 5403(d)). Furthermore, such a system of local regulation and enforcement would interfere with Federal superintendence of the manufactured home industry, in contravention of 24 CFR 3282.11(d).

Dated: April 24, 1997.

Nicolas P. Retsinas,

Assistant Secretary for Housing-Federal Housing Commissioner.

* * *

Supreme Court U.S.
FILED
AUG 29 1997
CLERK

No. 97-220

In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,

Petitioner,

vs.

CITY OF LA PORTE AND ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. HIGHTOWER

OLSON & OLSON
3485 Three Allen Center
333 Clay Street
Houston, Texas 77002
(713) 222-1281

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of La Porte, Texas, and the Zoning Board of Adjustment of the City of La Porte, Texas, request that this Court deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit entered on April 10, 1997.

STATEMENT OF THE CASE

This is a zoning case in which the Petitioner, a state trade association representing the mobile home industry, challenges the authority of Texas cities to regulate the location of mobile homes within their boundaries.

Only two months ago, the Court denied certiorari to the same Petitioner in a similar case under substantially identical circumstances. Petitioner seeks to distinguish its earlier petition from this one by arguing that the law has been changed by recent developments. Pet. 5-9. In fact, the "recent developments" on which Petitioner relies, an opinion of this Court issued on May 19, 1997, and a statement of policy published by the United States Department of Housing and Urban Development ("HUD") on April 24, 1997, do not change the law as applied to this case by the United States Court of Appeals for the Fifth Circuit.

REASONS FOR DENYING THE WRIT

I.

The Court has Recently Denied a Petition for Writ of Certiorari in a Similar Case Under Substantially Identical Circumstances.

On June 23, 1997, the Court denied the petition for a writ of certiorari in *Texas Manufactured Housing Association, Inc. and A. J. Waller, Sr. v. City of Nederland and Zoning Board of Appeals of the City of Nederland,* No. 96-1707. That case presented the same issues and arose in substantially the same procedural context as the instant case. The United States Court of Appeals for the Fifth Circuit specifically acknowledged the similarity of the two cases in its memorandum opinion in this case as follows:

> Having carefully considered the oral arguments, briefs, the opinions of the district court, and the record, we conclude that the recent panel decision in [the *Nederland* case] essentially forecloses TMHA's arguments. In particular we have reviewed the affidavits and exhibits relied upon by TMHA at oral argument to distinguish *Nederland*, and conclude that there is no distinction sufficient to raise a genuine issue of material fact on its commerce clause, preemption, or equal protection claims.

App. 4a-5a

II.

The Two Recent Developments Cited by Petitioners do not Change the Law Applied to this Case by the Court Below.

Petitioner seeks to distinguish its petition in this case from its petition in the *Nederland* case by arguing that this Court's recent decision in *Camps Newfound/ Owatonna, Inc. v. Town of Harrison, Me.*, 117 S. Ct. 1590 (1997), and a recent publication by the Department of Housing and Urban Development are material to the issues presented. Pet. 5-9. Contrary to Petitioner's assertions, these recent developments are not material to the issues raised in the Petition.

A. The Court's Decision in *Camps* is not Material to Petitioner's Claim that La Porte's Facially Neutral Zoning Ordinance had a Discriminatory Effect on Interstate Commerce.

Petitioner contends that the Court in *Camps* announces new principles of Commerce Clause analysis that are applicable to Petitioner's Commerce Clause claim in this case. Pet. 5-6. Petitioner cites general language from the *Camps* decision for the proposition that the Court has now adopted a more stringent standard of review for legislation challenged under the Commerce Clause that should be applied to this case. Contrary to Petitioner's assertions, *Camps* does not announce a new or more stringent standard of review but instead applies the established standard applicable to a "per se" violation. The state tax statute challenged in *Camps* was found to be discriminatory on its face. *Camps*, 117 S. Ct. at 1598.

State laws that discriminate against interstate commerce on their face are reviewed under the stringent "per se" standard. *Id.* In contrast, this case involves a claim that a facially neutral zoning regulation has the effect of discriminating against interstate commerce. The standards of review applicable to facially discriminatory and facially neutral legislation are substantially different. *Camps,* 117 S. Ct. at 1601, n. 16. The language Petitioner cites from *Camps* in support of their Petition is applicable only to "per se" cases and has no application to the facts of this case. *Id.*

B. The Publication of HUD's Statement of Policy is not Material to Petitioner's Claim that the Challenged Zoning Regulation is Preempted by Federal Law.

Petitioner also relies on a recently published statement of policy by the U.S. Department of Housing and Urban Development as support for their petition. Pet. 7-9. Statement of Policy 1997-1, 62 Fed. Reg. 24337, is an interpretive publication concerning HUD's position on the preemptive effect of the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Act"). The HUD policy is not material to Petitioner's preemption claim because HUD's position on preemption is consistent with the analysis of that issue by the Fifth Circuit and because HUD's interpretation, even if it did support Petitioner's claim, would not be binding on the courts.

1. HUD'S Position on the Preemptive Effect of the National Manufactured Housing Construction and Safety Standards Act is Consistent with the Preemption Analysis Employed by the Court Below.

The basic premise of the Statement of Policy is that a local governmental entity "is without authority to regulate or exclude certain manufactured homes through zoning ordinances or enforcement decisions that are based solely on a construction or safety code that is different from the Federal standards prescribed under the Act." App. 70a. The analysis suggested by the Statement of Policy is exactly the analysis performed by the Fifth Circuit in this case. (App. 4a-5a) and in the Nederland case, *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095, 1099-1100 (5th Cir. 1996), *cert. denied*, ___ S. Ct. ___ (1997). Therefore, the publication of the policy is immaterial to the issues resolved by the Fifth Circuit.

2. HUD has no Statutory Authority to Enforce or Issue Binding Interpretations of the Preemptive Provision of the National Manufactured Housing Construction and Safety Standards Act.

The Act grants HUD the authority to "establish by order appropriate Federal manufactured home construction and safety standards." 42 U.S.C. § 5403(a) (1995). The Act also prohibits states and their subdivisions from enacting manufactured housing construction and safety standards that are different from those promulgated by HUD. 42 U.S.C. § 5403(d). However, the Act does not provide HUD with authority to enforce 42 U.S.C.

§ 5403(d) (1995) or to adopt regulations interpreting the Act's preemptive effect.

On January 23, 1997, HUD published a document entitled "Manufactured Housing Construction and Safety Standards: Notice of Internal Guidance on Preemption." 62 Fed. Reg. 3456. In that document HUD acknowledged its lack of authority in this area, conceding that the Manufactured Housing Construction and Safety Standards Act "does not impose a duty on HUD to make any determination as to the applicability of the [Act's] preemption provision, to investigate preemption issues, or to render advisory opinions regarding preemption questions." App. 59a. HUD's subsequent publication of Policy Statement 97-1 on May 5, 1997, in which it sets out its interpretation of the applicability of the Act's preemption provision to certain local regulations, is clearly not determinative on the question of preemption. As HUD explains in its January 23, 1997, publication, "Generally, enforcement of preemption requirements is left up to the Courts. Where an issue is unclear, it is appropriate for the Courts to decide whether a State or local requirement is preempted." App. 59a. Thus, even if HUD's statement of policy could be read to support Petitioner's preemption claim it would not be material to the resolution of the claim.

CONCLUSION

Respondents respectfully urge the Court to deny the Petition for the reasons stated.

Respectfully submitted,

JOHN J. HIGHTOWER
OLSON & OLSON

3485 Three Allen Center
333 Clay Street
Houston, Texas 77002
(713) 222-1281

Counsel for Respondents

MOTION FILED
SEP - 4 1997

No. 97-220

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,
Petitioner,
v.
CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL FOUNDATION OF MANUFACTURED HOME OWNERS, INC., LOUISIANA MANUFACTURED HOUSING ASSOCIATION, INC. AND MISSISSIPPI MANUFACTURED HOUSING ASSOCIATION, INC. IN SUPPORT OF PETITIONER

DAVID A. HOLZWORTH
(*Counsel of Record*)
LEPON MCCARTHY WHITE
& HOLZWORTH
1225 19th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 857-0242
Counsel for National Foundation of Manufactured Home Owners, Inc., Louisiana Manufactured Housing Association, Inc. and Mississippi Manufactured Housing Association, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-220

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,
Petitioner,

v.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Amici curiae National Foundation of Manufactured Home Owners, Inc. (NFMHO), Louisiana Manufactured Housing Association, Inc. (LMHA) and Mississippi Manufactured Housing Association, Inc. (MMHA) respectfully move this Court, pursuant to Supreme Court Rule 37.2, for leave to file the brief submitted herewith, as *amici curiae* in support of Petitioner Texas Manufactured Housing Association, Inc.'s Petition for a Writ of Certiorari.

Petitioner has consented to the filing of this brief, but respondents have withheld consent. A copy of the proposed *amici curiae* brief is attached.

NFMHO is a non-profit, fully volunteer organization with its headquarters in Daly City, California. NFMHO was founded 30 years ago for the purposes of protecting the constitutional and human rights of manufactured home owners; dispelling the myths and misconceptions about manufactured housing and manufactured home owners, held by the public, the media, and most government officials; monitoring state and federal agencies to ensure the enforcement of existing laws, regulations and programs designed to protect manufactured home owners; and guaranteeing the treatment of manufactured home owners, equal to, and no differently from, conventional home owners.

LMHA and MMHA are statewide, non-profit associations which represent manufacturers, retailers, lenders, insurance companies, and manufactured housing communities. Manufacturers in Louisiana and Mississippi produce HUD-code homes that are shipped and sold to homeowners in all parts of Texas and other neighboring states, most of which are within the jurisdiction of the Fifth Circuit. Texas is, from year to year, either the largest or second largest market for HUD-code homes. From May 1996 to May 1997, 1246 of the 2229 homes built in Louisiana were shipped to Texas.

Amici are submitting this brief because of their concern that the Fifth Circuit Court of Appeals' ruling will have an adverse impact on a large class of homeowners by limiting access to affordable housing in desirable locations. Indeed, the outcome of this case will have a direct, tangible and nationwide impact on the choices available to approximately 32.4 percent of all new homeowners, in terms of where they can live, where their children can go to school and the potential for their homeownership investment to appreciate. The case will have a

further impact on the status of approximately 18 million people—over 7 percent of the U.S. population—who currently live in 7.3 million HUD-code homes that serve as their primary residences. These 18 million people form the group most likely to aspire to the purchase of a HUD-code home built in a primary residential area.

This *amici curiae* brief can assist the Court in applying the correct engineering and regulatory analysis to the preemption clauses contained in the National Manufactured Housing Construction and Safety Standards Act. *Amici* submit that such an analysis was missing from the truncated summary judgment and per curiam affirmance of the courts below.

In light of the foregoing, we respectfully request that this Court grant leave to file the attached brief of the *amici.*

Respectfully submitted,

DAVID A. HOLZWORTH
(*Counsel of Record*)
LEPON MCCARTHY WHITE
& HOLZWORTH
1225 19th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 857-0242
Counsel for National Foundation of Manufactured Home Owners, Inc., Louisiana Manufactured Housing Association, Inc. and Mississippi Manufactured Housing Association, Inc.

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INTEREST OF *AMICI CURIAE* [1]

The interest of amici is identical to a primary objective of the President's National Homeownership Strategy: [2] namely, the elimination of barriers to locating affordable HUD-code homes [3] in desirable residential areas.

The National Foundation of Manufactured Home Owners, Inc. is a non-profit, fully volunteer organization with its headquarters in Dale City, California. NFMHO was founded 30 years ago for the purpose of protecting the constitutional and human rights of manufactured home owners; dispelling the myths and misconceptions about manufactured housing and manufactured home owners, held by the public, the media, and most government officials; monitoring state and federal agencies to ensure the enforcement of existing laws, regulations and programs designed to protect manufactured home owners; and guaranteeing the treatment of manufactured home owners, equal to, and no differently from, conventional home owners.

The Louisiana Manufactured Housing Association, Inc. and the Mississippi Manufactured Housing Association, Inc. are statewide, non-profit associations which represent manufacturers, retailers, lenders, insurance companies, and manufactured housing communities. Manufacturers in Louisiana and Mississippi produce HUD-code homes that are shipped and sold to homeowners in all parts of Texas and other neighboring states.[4]

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[1] The petitioner in this case made a monetary contribution to the preparation of the brief. The brief was authored in its entirety by counsel for amici.

[2] U.S. Dep't of Housing and Urban Development, *The National Homeownership Strategy: Partners in the American Dream* (May 1995) *reprinted in part in* Appendix A.

[3] The term "HUD-code home" describes manufactured housing built to the nationally preemptive performance standards established by HUD regulations contained in 24 C.F.R. pt. 3280 (1997). HUD-code homes are defined by regulation as distinct from other factory-built residential dwellings constructed to local building codes. *See* 24 C.F.R. §§ 3280.7 and 3282.12.

[4] In 1996, 2,500 homes were produced in Louisiana with an average sales price of $33,300. In the same year, 15,330 homes were

SUMMARY OF ARGUMENT

The outcome of this case will have a direct, tangible and nationwide impact on the choices available to approximately 32.4 percent of all new home purchasers, in terms of where they live, the school that their children may attend and the potential for their investments to appreciate.[5] The outcome of this case will also have an impact on the status of approximately 18 million people—over 7 percent of the U.S. population—who currently live in 7.3 million HUD-code homes that serve as primary residences.[6] These eighteen million people form the group most likely to aspire to the purchase of a HUD-code home permanently installed in a primary residential area. In 1996, 98 corporations located throughout the United States shipped 363,411 homes from 313 plants accounting for retail sales estimated at $13.8 billion and a gross economic impact of $28.3 billion.[7] Whether quantified in dollars or evaluated in terms of the quality of family, home and community life, the local zoning exclusions applied in this case to HUD-code homes raise significant and serious issues of national importance.

This case also presents an important statutory preemption question at the heart of the federal system.[8] The

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produced in Missisippi with an average sales price of $31,700. Manufactured Housing Institute, *Statewide Manufactured Housing Economic Impact Study (1996)* (last modified July 8, 1997) <http://www.mfghome.org/members/stats/96econ.html>.

[5] Manufactured Housing Institute, *Manufactured Home Shipments and Single-Family Housing Starts and Homes Sold (1980-1996)* (visited Aug. 12, 1997) <http.//www.mfghome.org/members/stats/starts.html>.

[6] Manufactured Housing Institute, *Just the Facts*, (last updated Feb. 5, 1997) <http://www.mfghome.org/media/facts297.html>.

[7] *Id.*

[8] This brief does not address the Commerce Clause issues raised in the Petitioner's Brief. However, the technical engineering and regulatory analysis submitted by *amici* does support the Commerce Clause arguments.

National Manufactured Housing Construction and Safety Standards Act (hereafter "the Act") and the Department of Housing and Urban Development's (HUD's) implementing regulations, preemption letters, January 1997 Guidelines and May 1997 Statement of Policy all prohibit local zoning boards from restricting the location of HUD-code homes on the basis of "construction and safety" requirements imposed by the Act. The City of La Porte has, *de jure* and *de facto,* excluded *all* HUD-code housing from primary residential areas, but has failed to articulate a legitimate aesthetic or compatability standard for the exclusion. Though disguised as a land use regulation, the exclusion is made on the sole basis of a preempted construction requirement: namely, the attachment of a permanent chassis to the structure. Thus, the Court has before it a conflict between the interest of Congress and the President in promoting access to affordable housing built to a national preemptive standard, and the power asserted by a local zoning board to bar that housing from primary residential areas solely because it is built to that national preemptive standard.

This brief attempts to provide the Court with some of the economic, technical and engineering data, missing from the truncated proceedings below, that are necessary to understand the intended scope of the national preemptive construction standards. The Fifth Circuit has now affirmed two cases that severely limit and deviate from HUD's interpretation of the preemptive scope of the Act in the absence of an accurate technical understanding of the complex regulatory framework and the engineering capabilities of manufactured housing.[9] Amici urge the Court to issue a GVR order to correct this error because

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[9] The other case, upon which the Fifth Circuit placed primary reliance in deciding this case, was *Texas Manufactured Housing Ass'n v. City of Nederland*, 905 F. Supp. 371 (E.D. Tex. 1995), *aff'd*, 101 F.3d 1095 (5th Cir. 1996), *cert. den.*, —— U.S. ——; 117 S.Ct. 2497; —— L.Ed. —— (1997).

of the adverse impact it will have on the availability of affordable housing in desirable locations.

ARGUMENT

I. THE SUMMARY JUDGMENT OPINION AND THE PER CURIAM AFFIRMANCE BELOW ARE NOT INFORMED BY, CONSISTENT WITH, OR IN DEFERENCE TO HUD'S INTERPRETATION OF THE ACT'S PREEMPTION CLAUSE.

A. The Courts Below Misconstrued and Misapplied the Preemption Construction Standards of the Act.

The opinions below did not—indeed, could not—articulate any aesthetic or dimensional criteria that distinguishes *all* HUD-code homes from *all* modular or other factory built homes. On the contrary, the District Court accepted the Petitioner's proffer that *many* HUD-code homes are compatible with and visually indistinguishable from site built homes.[10] The District Court illogically concluded that *all* HUD-code homes could be excluded because at least *some* may not be aesthetically compatible with site-built homes.

This fallacy of logic infects the District Court's preemption analysis. The District Court opines that "rather than establish construction or safety standards for manufactured homes, La Porte has excluded manufactured homes from its 'R-1' districts."[11] The District Court's rationale, however, begs the question: what is the basis for

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[10] *Texas Manufactured Housing Ass'n v. City of La Porte*, CA No. H-94-1066 (S.D. Tex. decided Aug. 9, 1996), *reprinted in* Petitioner's Brief Appendix C, at 15a-16a.

[11] La Porte's exclusion of all HUD-code homes does, in fact, establish variant construction and safety standards because other factory housing that conforms to local code instead of HUD-code is permitted within primary residential areas. In fact, LaPorte's Chief Building Official expressly stated that the HUD-code home at issue in this case could be replaced with a modular home. See letters of Mark Lewis reprinted in Appendices G-1 and G-2.

the exclusion of *all* HUD-code homes? It cannot be aesthetic or compatibility criteria because *many* HUD-code homes are admitted to be visually indistinguishable from site-built and other factory built homes. *All* HUD-code homes, however, have a permanent chassis and conform to HUD-code construction and safety standards, the only criteria mentioned (albeit erroneously) to distinguish *all* HUD-code homes from factory built homes permitted in primary residential areas.

Cloaked in the guise of regulating land use, the City of La Porte asserted—and the District Court expressly adopted—the disputed factual rationale that total exclusion legitimately and effectively protected property values. The District Court's treatment of this rationale further exposes the logical flaw in its preemption analysis.

La Porte asserted—and the District Court accepted—the disputed factual contention that the presence of HUD-code homes may lead to a decrease in property values for surrounding conventional or non-HUD-code factory built homes.[12] In theory, but not in fact, this feared decrease in values derives from the mere existence—not the actual use—of a permanent chassis which could possibly be used sometime in the future to move the home.[13] The rationale, carried to its logical conclusion, implies that a local zoning board could exclude *all* HUD-code manufactured housing from *all* residential areas, i.e. essentially prohibiting their use altogether. Indeed, the District Court quoted with approval *dicta* from *Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1525 (11th Cir. 1988) that a local zoning

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[12] A number of scientifically conducted studies debunk the notion that HUD-code homes have a negative impact on property values. *See, e.g.*, Kate Warner and Jeff Scheuer, University of Michigan, *Manufactured Housing Value* (Manufactured Housing Research Project Report 3); Kate Warner and Jeff Scheuer, University of Michigan, *Manufactured Housing Impacts on Adjacent Property Values* (Manufactured Housing Research Project Report 4).

[13] Petitioner's Brief Appendix C, *supra* note 10, at 12a.

board could limit housing in a primary residential area "to conventionally-built residences and exclude mobile homes." Exclusionary zoning of HUD-code homes on this rationale interferes with federal superintendence of the manufactured housing industry. It is based solely on a performance characteristic mandated by federal law, i.e. the attachment of a permanent chassis to the structure of the manufactured house. The rationale has no grounding in legitimate aesthetic or compatibility standards within the province of local zoning boards.[14]

On January 23, 1997, HUD published "Guidelines for Analyzing Situations Involving Preemption Under the Manufactured Home Construction and Safety Standards Act" (hereafter "Guidelines").[15] On May 5, 1997, HUD published a Statement of Policy.[16] The Guidelines and Statement of Policy state criteria that, if properly applied,

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[14] This link between a permanent chassis, permanent mobility and a perceived effect on property values is tenuous at best and largely chimerical. Over 95 percent of HUD-code homes are never moved once they are installed. *See, infra* fn. 35. The home at issue in this case was to be permanently attached to the foundation. "Obviously this was not a home that could leave by turning on the ignition." *Geiger v. Zoning Hearing Board of North Whitehall*, 510 Pa. 231, 237, 507 A.2d 361 (1986) ("This Court has held that it is arbitrary to apply the classification of "mobile home" or "trailer" to a structure which, once improved, will not in fact be a mobile home or a trailer either as defined by the local zoning Ordinance or by common sense. *Anstine v. Zoning Board of Adjustment*, 411 Pa. 33, 190 A.2d 712 (1963).") Other state supreme courts have reached the same conclusion. *Luczynski v. Temple*, 203 N.J. Super. 377, 497 A.2d 211 (1985); *Cannon v. Coweta County*, 260 Ga. 56, 389 S.E.2d 329 (1990).

[15] Manufactured Housing Construction and Safety Standards, 62 Fed. Reg. 3456 (1997) (to be codified at 24 C.F.R. Pt. 3282) *reprinted in* Petitioner's Brief Appendix E at 58a-65a.

[16] Manufactured Housing: Statement of Policy 1997-1, State and Local Zoning Determinations Involving HUD-Code, 62 Fed. Reg. 24337 (1997) (to be codified at 24 C.F.R. pts. 3280, 3282) *reprinted in* Petitioner's Brief Appendix E at 65a-71a.

preempt the City of La Porte's exclusion of *all* HUD-code homes from primary residential areas.[17]

The HUD Guidelines and Statement of Policy articulate two preemption tests: the first based on construction standards, and the second, more general, based on the Federal superintendence of the industry:

> In accordance with the Act, the regulation bars States from imposing a manufactured home standard regarding *construction and safety* that covers the same aspects of performance governed by a Federal standard. More generally, States may not take any action that could interfere with the *Federal superintendence* of the industry as established by the Act (24 CFR 3282.11).[18]

Both preemption tests, applied in light of engineering requirements imposed by the regulations, prohibit La Porte's exclusion of *all* HUD-code homes from primary residential areas.

B. The Act, as Interpreted and Applied by HUD, Preempts Zoning Exclusion of *All* HUD-Code Homes Based on the Construction Standard of a Permanent Chassis.

The Guidelines expressly prohibit exclusionary zoning based on "construction and safety standards."[19] According to the Guidelines:

> [A] locality is free to adopt and enforce ordinances that regulate the *appearance and dimensions* of homes

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[17] The preemption clause of the Act is contained in 42 U.S.C. § 5403(d) (1994). The regulatory preemption clause is contained in 24 C.F.R. § 3282.11(d) (1997).

[18] 62 Fed. Reg. 3456 (Jan. 23, 1997), *supra* note 15, at 3457; Petitioner's Brief Appendix E, *supra* note 15, at 58a (emphasis added).

[19] *Id.* at 60a, 61a.

> so long as the criteria established by such ordinances do not have the effect of excluding manufactured homes based on the *construction and safety standards* to which they were built.[20]

Thus, the Guidelines juxtapose and contrast proper zoning criteria that are not preempted by the Act—"appearance and dimensions"—with improper criteria that are preempted by the Act—"construction and safety standards." Contrary to the HUD Guidelines, La Porte's ordinance, though disguised as land use regulation, excludes HUD-code homes from primary residential areas because of the permanent chassis,[21] a construction feature not only required by the HUD-code, but which is an integral part of the statutory definition of a HUD-code manufactured home.[22] Moreover, the permanent chassis, located under

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[20] *Id.* at 60a (emphasis added).

[21] The term "permanent chassis" is not defined in either the Act or the regulations. "Chassis" is defined at 24 C.F.R. § 3280.902(a) to mean "the entire transportation system," including hitch, axles and wheels. In contrast, "frame" is defined at 24 C.F.R. § 3280.902(d) to mean:

> . . . the fabricated rigid substructure which provides considerable support to the affixed manufactured home structure both during transport and on-site, and also provides a platform for securement of the running gear assembly, the drawbar and coupling mechanism.

Because the regulations permit the removal of the "running gear assembly, drawbar and coupling mechanism," the "frame" is the "permanent chassis."

[22] The definition of a "manufactured home" is contained in the statute at 42 U.S.C. § 5402(6) (1994):

> "[M]anufactured home" means a structure, transportable in one or more sections, which in the traveling mode, is eight body feet or more in width, or forty body feet or more in length, or when erected on site, is three hundred twenty or more square feet, *and which is built on a permanent chassis* and is designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and

the home and often attached to a permanent foundation, does not fall within the scope of "appearance and dimensions" criteria deemed by the Guidelines to be legitimate local zoning criteria.

The La Porte exclusion of *all* HUD-code homes from primary residential districts fits exactly the type of zoning ordinance that establishes a variant construction standard preempted by the Act under the HUD Guidelines. The Guidelines speak clearly and squarely to the point:

> If a locality, however, is attempting to regulate, and even exclude, certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different from that prescribed by the Act, the locality lacks such authority.[23]

La Porte is, in fact, excluding *all* HUD-code homes through zoning enforcement based on a construction requirement imposed by the Act, i.e. the permanent chassis. The permanent chassis cannot even be seen once the home is installed. It is not relevant to the "appearance and dimensions" of the structure or other criteria within the legitimate province of local zoning boards.

The Guidelines also articulate a test to apply in determining whether illegitimate construction based criteria have been used by a local zoning board to exclude HUD-code homes that are "aesthetically the same" as other homes that are not excluded:

> electrical systems contained therein; except that such term shall include any structure which meets all the requirements of this paragraph except the size requirements and with respect to which the manufacturer voluntarily files a certification required by the Secretary and complies with the standards established under this chapter.

(Emphasis added.)

[23] 62 Fed. Reg. 3456, *supra* note 15, at 3457; Petitioner's Brief Appendix E, *supra* note 15, at 61a (emphasis added).

> Thus, a locality cannot accept structures meeting the Federal definition of manufactured homes which comply with different standards, such as local or State Building Codes, and exclude or restrict manufactured homes that are aesthetically the same but meet only the Federal standards. *By excluding or restricting only manufactured homes built to the Federal standards, and accepting manufactured homes built to other codes, the locality is establishing standards different than the Federal standards.*[24]

The La Porte ordinance and zoning action fails this test.

La Porte's zoning ordinance permits the installation in primary residential districts of factory housing built to local code building standards. (R. at 25). Factory housing, built to local codes, can be—and often has been—constructed with a permanent chassis.[25] A modular home, affixed to a permanent chassis, can be built to local codes, transported by chassis to the site and installed without incurring additional expense for a crane to lift it into place. On-frame modulars can also be installed, more easily and at less expense, on a pier system instead of a full masonry perimeter foundation that would be necessary for a modular without a permanent chassis. Many manufacturers have developed the ability to build modular homes "on

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[24] *Id.* (emphasis added).

[25] Respondents erroneously represented to the Fifth Circuit that a modular home cannot be constructed to include a permanent chassis. Appellees' Brief at 11. The respondents in *Texas Manufactured Housing Ass'n v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2497 (1997) made an equally erroneous statement to this Court: "Modular homes do not have a permanent chassis." Respondents' Supplemental Brief at 5. The erroneous representations are contradicted by the twelve HUD preemption letters, *reprinted in* Appendices B1-B12, which specifically address the recurring situations where local zoning boards exclude HUD-code homes from areas where modular homes built on permanent chassis are permitted. Moreover, the regulations specifically describe modular on-frame houses that meet the HUD-code definition of manufactured home. 24 C.F.R. § 3280.7 and § 3282.12.

frame" simply because of the local zoning prejudices and restrictions against the location of HUD-code homes in desirable residential areas.[26]

HUD has issued at least twelve "preemption letters" to local zoning boards to prohibit exclusion of HUD-code homes from areas that are zoned for inclusion of "on frame" or chassis-built modular homes.[27] These preemption letters, dated from September 1992 through June 1996, foreshadow the regulatory and engineering analysis that appeared this year in the Guidelines and Statement of Policy. All of the letters advise that ordinances similar to La Porte's are preempted by the Act. Thus, La Porte's exclusion of *all* HUD-code homes from primary residential areas, but inclusion of housing built to local code with a permanent chassis, fails the test articulated in HUD's preemption letters and Guidelines.[28] Moreover, the number of letters sent and the geographic distribution of the communities that received them show that improper and preempted zoning exclusions are persistent, recurring and national in scope. If let stand, the Fifth Circuit per curiam affirmance of the trial court's summary judgment will undercut and reverse HUD's efforts over the years to preempt sweeping bans on *all* HUD-code homes when visually indistinguishable factory built housing is permitted.

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[26] Appendix C lists fourteen companies located throughout the United States that manufacture modular homes with a permanent chassis. Five of those companies are members of the Louisiana Manufactured Housing Association.

[27] The HUD preemption letters are reprinted in Appendix B.

[28] The District Court failed to understand the engineering point, which further illustrates the importance of remanding the case for reconsideration informed by the HUD Guidelines admonition that determining the scope of the preemptive application of the Act often involves an engineering as well as a legal analysis.

C. The Act, as Interpreted and Applied by HUD, Also Preempts the Exclusion of *All* HUD-Code Homes Under the Federal Superintendence Test.

The HUD Guidelines illustrate the superintendence test with an example helpful to an analysis of the La Porte ordinance:

> Thus, for example, a local requirement that all homes be constructed on site, while not covering any aspect of performance, would be so fundamentally in conflict with the Federal standards as to impair the Federal superintendence of the manufactured home program. Such a requirement would be preempted under the HUD regulations.[29]

La Porte's exclusionary ordinance cannot survive the "superintendence" test,[30] because La Porte's ordinance functionally requires all housing in primary residential districts to conform to local codes. The superintendence test expressly preempts a local ordinance, such as La Porte's, that does not articulate discrete aesthetic criteria, but which excludes *all* HUD-code homes as a class, even those HUD-code homes that cannot be visually distinguished from site-built or other factory built housing. Such a preclusive ordinance, issued under the guise of "regulating land use", is so broad that it effectively eviscerates the preemptive provisions of the Act.[31]

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[29] 62 Fed. Reg. 3456, *supra* note 15, at 3458; Petitioner's Brief Appendix E, *supra* note 15, at 64a.

[30] The superintendence test, essentially, incorporates the rule that a local or state law is preempted when it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *See, e.g., Michigan Canners and Freezers Association v. Agriculture Marketing and Bargaining Board*, 467 U.S. 461, 469, 104 S.Ct. 2518, 2523, 81 L.Ed. 2d 399 (1984).

[31] *See Colorado Manufactured Housing Ass'n. v. Board of County Commissioners of Pueblo, Colorado*, 946 F.Supp. 1539, 1551 (D. Colo. 1996).

D. GVR Treatment Is Warranted by Intervening Developments and the Truncated Proceedings Below.

The standard for granting summary judgment, under Federal Rule of Civil Procedure 56(c), is the same as the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), *i.e.*, whether ". . . there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). This case, at a minimum, involves a disputed issue of material fact as to whether La Porte's ordinance permits on-frame modular homes to be sited in primary residential areas which exclude HUD code homes.[32]

The lower courts failed to defer to the executive agency's interpretation of the statute or regulation that the agency is responsible for administering. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L. Ed. 2d 694 (1984). Deference to an administrative agency is especially warranted when the case involves complex regulatory or technical issues within the special expertise and competence of the agency. *Id.* The HUD Guidelines expressly caution that "either an engineering analysis or a legal analysis, or both" are often required to determine whether a local zoning ordinance is prempted by the Act or the regulations.[33]

The administrative reinterpretation of a federal statute, not fully considered by a lower court, presents an appro-

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[32] This precise issue was presented to the District Court (R. 461-471) (list of genuine issues of material fact; nos. 9, 12, 25, and 52), and to the Fifth Circuit (Brief of Appellant, Section I), as an example of a disputed fact issue precluding summary judgment.

[33] 62 Fed. Reg. 3456, *supra* note 15, at 3457; Petitioner's Brief Appendix E, *supra* note 15, at 59a.

priate case for granting certiorari, vacating and remanding the case for fuller consideration. *Lawrence v. Chater,* 116 S.Ct. 604, 606, 133 L.Ed. 2d 545 (1996), *citing Schmidt v. Espy,* 513 U.S. 801, 115 S.Ct. 43, 130 L.Ed. 2d 5 (1994). There is, in this case, both "intervening developments" and "recent developments" that the court below did not fully consider. There is also "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence, supra,* 116 S.Ct. at 607. Finally, it "appears that such a redetermination may determine the ultimate outcome of the litigation." *Id.*

The District Court did not have the benefit of HUD's preemption letters, Guidelines or Statement of Policy on April 2, 1996, when it granted the City of La Porte's motion for summary judgment, or on August 9, 1996, when it entered its order denying Petitioner's motion for reconsideration.[34] The HUD Guidelines, but not the HUD Statement of Policy, were available by the time the Fifth Circuit issued its per curiam opinion affirming the district court on April 10, 1997. The per curiam opinion, however, relies primarily upon an earlier Fifth Circuit decision in *Texas Manufactured Housing Ass'n v. City of Nederland,* 905 F.Supp. 371 (E.D.Tex. 1995), *aff'd,* 101 F.3d 1095 (5th Cir. 1996), *cert. den.*, —— U.S. ——, 117 S.Ct. 2497, —— L.Ed. —— (1997), a case which also preceded HUD's Guidelines and Statement of Policy. The Fifth Circuit denied petitioner's motion for rehearing on May 7, 1997.

La Porte's exclusionary ordinance presents exactly the type of case that would have benefited from an engineer-

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[34] *Memorandum and Order on Motion for Reconsideration,* in *Texas Manufactured Housing Ass'n v. City of La Porte,* No. 96-20422 (5th Cir. 1996), *reprinted in* Petitioner's Brief Appendix C, at 7a-10a.

ing analysis and the legal analysis available through consideration of the preemption letters, Guidelines and Policy Statement.

II. THE DECISIONS BELOW IMPROPERLY EXCLUDE AESTHETICALLY COMPATIBLE HUD-CODE HOMES FROM PRIMARY RESIDENTIAL DISTRICTS.

The modern HUD-code home is not the trailer house of a bygone era. Once HUD-code homes are installed, over 95 percent are never moved.[35] Residents do move, but they usually resell their homes in place just as though they were a conventional site-built home. "For multisection homes, with their section-to-section utility connections and interior and exterior trimwork and finishes on walls, floors, and ceilings, relocating the house can cost more than $10,000." *Id.* When installed, the hitch, axles and wheels are usually removed. Often homes are installed on permanent foundations (including full basements) with floor plans that allow for over 2000 square feet of living space, attached garages, sheet rock walls, clapboard siding, bay windows and fully shingled roofs.[36] In essence, the exterior and interior appearance of a HUD-code home can be made virtually indistinguishable from other factory housing built for on-site assembly or even conventional "stick" housing.[37]

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[35] George Allen, *Developing and Financing in Land-Lease Communities, in Urban Land*, Jan. 1996, at 36; Peter A. Keyes and Steven Winter, *The Manufactured Home: Design and Construction in Urban Land*, Jan. 1996, at 28. *See also* Welford G. Sanders, American Planning Association, *Regulating Manufactured Housing* (Planning Advisory Service Report Number 398, 1986) at 1.

[36] Keyes and Winter, *supra* note 35, at 30. *See also* newspaper articles cited in Appendix D.

[37] Welford G. Sanders, *Regulating Manufactured Housing in Urban Land*, Jan. 1995, at 46; University of Michigan Study *cited in Building a Foundation in Manufactured Housing*, America's Community Banker, Sept. 1995, at 12, 13.

These aesthetically compatible HUD-code homes have received enthusiastic and widely reported reviews.[38] The versatility of HUD-code homes will soon be demonstrated again through the Urban Design Project sponsored by the Manufactured Housing Institute.[39] As reported in the *Washington Post*,[40] HUD-code homes, costing 25 to 30 percent less than conventional stick homes built on-site, will be constructed in six communities, including Washington, D.C.[41] The houses will feature, among other amenities, two stories, full basements, steeply pitched roof lines, wrap-around porches and garages.

Modern construction techniques account for the longevity of HUD-code homes which, according to a recent analysis of census data, average 55.8 years.[42] The manufacturing process has been described as "a kind of rationalized stick-building under controlled conditions."[43] As the chassis moves along an assembly line, workers at each station use sophisticated cutting and fastening machinery to attach walls and roofs that are built off-line. Many manufacturers control the process with integrated computer-assisted design and computer-assisted manufacturing

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[38] Appendix D contains citations to newspaper accounts that have appeared in the last two years reporting on the modern technological advances that have been used to manufacture HUD-code homes aesthetically compatible with on-site stick-built homes. Color photographs and reprints, which cannot easily be reproduced in the form of an appendix, have been lodged with the Clerk of Court to illustrate the aesthetic compatibility of HUD-code homes.

[39] Appendix E.

[40] Kenneth R. Harney, *Inexpensive Factory-Built Homes to Take Root on Urban Landscapes*, Wash. Post., Jan. 18, 1997, at F1.

[41] The other five communities are Birmingham, Alabama; Denver, Colorado; Louisville, Kentucky; Milwaukee, Wisconsin; and Wilkinsburg, Pennsylvania.

[42] Carol B. Meeks, Manufactured Housing Institute, *Manufactured Home Life*, May 1995, at 9, 10.

[43] Keyes and Winter, *supra* note 35, at 28.

systems (known as CAD/CAM). By these means higher and more consistent quality can be maintained in HUD-code manufacturing than in site-built construction. In addition, company quality control and HUD-required inspections occur daily, thereby assuring consistent compliance with the performance based standards.

Another reflection of the advances in manufactured housing is the availability of traditional FHA, VA and USDA Rural Housing Service loans to finance the purchase of HUD-code homes.[44] In part, such financing is available because HUD-code homes are as durable as conventionally built housing.[45] Nevertheless, as HUD's preemption letters, Guidelines and Statement of Policy reflect, many zoning boards have continued to exclude HUD-code homes on the basis of construction criteria, thereby interfering with HUD's preemptive superintendence of the manufactured housing industry.

III. THE DECISIONS BELOW ALSO INTERFERE WITH THE AVAILABILITY OF AFFORDABLE HOUSING.

HUD-code homes are the most affordable form of new housing presently available. According to the U.S. Department of Commerce, Bureau of Census, the 1996 average sales price of a new site-built home (structure only) was $124,650.[46] With an average size of 2,125 square feet, conventional stick-built housing cost $58.66 per square

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[44] HUD loan program, *see* 24 C.F.R. pt. 201 (1997); VA loan program, *see* 38 C.F.R. pt. 26 (1996), 38 U.S.C. § 3712 (1996); USDA/RHS loan program, *see* 7 C.F.R. § 3550.73 (1997).

[45] *Building a Foundation in Manufactured Housing, supra* note 37, at 12.

[46] Manufactured Housing Institute, *Cost and Size Comparisons for New Manufactured Homes and New Single-Family Site-Built Homes (1970-1995)* (visited Aug. 4, 1997) <http://www.mfghome.org/members/stats/costs.html>.

foot.[47] The average cost of HUD-code manufactured housing compares very favorably, at $27.83 per square foot, about half the unit cost of site-built housing. In addition, the average size of HUD-code housing was 1,380 square feet resulting in a structural cost of $38,400 or a little less than one-third of the cost of site-built housing.[48]

Not surprisingly, the affordability of HUD-code manufactured housing has led to increased demand. In 1980, HUD-code housing accounted for 28.9 percent of all new single family homes sold, 221,091, out of 545,000.[49] By 1996, the percentage of new homes sold had increased to 32.4 percent, 363,411 out of 757,000.[50]

"For many low- and moderate-income families, manufactured housing represents the only form of housing they will ever be able to afford to own."[51] Affordable HUD-code homes make it possible for millions to share in the American dream of family home ownership who would otherwise be left out.

The importance of HUD-code housing as a solution to the nation's shortage of affordable housing is evident. Equally evident, the decision in the La Porte case stands as an obstacle to that objective. In short, as a matter of law, the exclusion has been preempted by the Act; as a matter of policy, the exclusion defeats the President's call, in the National Homeownership Strategy, to eliminate regulatory and financial barriers to the availability of manufactured housing.

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[47] *Id.*

[48] *Id.* The average cost and size of a multi-section home was $47,300 and 1600 square feet, or a little less than 38 percent of the cost of a site built home.

[49] Manufactured Housing Institute, *supra* note 5.

[50] *Id.*

[51] Sanders, *supra* note 35, at 4.

CONCLUSION

For the reasons set forth above, the Court should grant certiorari, vacate the opinions below and remand to the District Court for reconsideration in light of HUD's preemption letters, recently issued Guidelines and Statement of Policy.

Respectfully submitted,

DAVID A. HOLZWORTH
(Counsel of Record)
LEPON MCCARTHY WHITE
& HOLZWORTH
1225 19th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 857-0242
Counsel for National Foundation of Manufactured Home Owners, Inc., Louisiana Manufactured Housing Association, Inc. and Mississippi Manufactured Housing Association, Inc.

APPENDICES

APPENDICES

APPENDIX A

Excerpts from the National Homeownership Strategy: Partners in the American Dream U.S. Department of Housing and Urban Development (May 1995), pages 3-11, 3-12, 3-13 and 3-14

Eliminate Regulatory and Financing Barriers to the Availability of Manufactured Housing

STRATEGY: The partnership should initiate a series of major regulatory, administrative, legislative, research, and educational initiatives to eliminate barriers to the availability of quality, affordable manufactured housing and to its acceptance among State and local regulatory agencies and financing entities.

Issues and Impediments: Manufactured housing is a major source of affordable housing, especially for many lower and moderate-income families living in rural and suburban areas. In 1994 over 300,000 manufactured homes—one out of every five single-family homes built—were added to the national housing stock.

Most purchasers of manufactured homes who would not otherwise be able to purchase a home express satisfaction with their home. Yet, prospective homebuyers face Federal, State, and local regulatory, as well as financing, barriers. Some of these barriers stem, in part, from the public's perception of the quality, safety, and durability of manufactured housing.

There is general support among the homebuilding industry, consumer groups, and government regulators that the following initiatives will increase the availability of manufactured housing:

- Continuation of a Federal preemptive building code and a uniform enforcement system to facilitate interstate commerce and ensure affordability.
- Fair and timely administration of construction standards.

- Establishment and enforcement of State installation standards and other appropriate regulatory programs.
- Effective, market-driven consumer warranties.
- Access to the full range of housing finance resources.

Manufactured housing has a unique status—it's the only housing built under a Federal preemptive code. As such it is the only form of housing in which the Federal Government, working in cooperation with private industry and State and local governments, plays the leading role in the construction process. The performance nature of the HUD code, with emphasis on value engineering and uniform enforcement, has allowed a range of technological innovations in the use of materials and procedures.

North Carolina has one of the most comprehensive and successful State programs for manufactured housing in the nation. Key elements of the program include:

Consumer Complaint Tracking—Staff process and handle complaints.

Training in Home Setup and Anchoring—The State trains dealers and sets up companies on proper techniques for installing and handling.

Setup Standards—The State will publish a manual on generic setup requirements for all manufactured homes.

Tie-Down Requirements—North Carolina has required tie down of all manufactured and mobile homes since 1970.

Third-Party System—A third-party inspection agency has been used since 1970 to enforce State restrictions and relicensing requirements.

Warranty Program—North Carolina required a 12-month warranty on all new homes for "substantial" defects that affect the performance of the home.

Licensing—manufacturers, setup companies, dealers, and sales persons all must be licensed by State agencies.

For a number of reasons—legal considerations of property title and taxation, sales and distribution systems, zoning and land-use patterns, and family income—most manufactured homes are owned as personal property rather than as real estate. Such ownership requires that these homes be financed with consumer loans rather than with conventional home mortgages. Homebuyers who wish to locate their manufactured homes on land they own or are purchasing deserve access to mortgage financing. There now are barriers to placing a mortgage on property that includes a manufactured home. Manufactured home financing has evolved along a separate path from other single-family home financing. As a result, communication between traditional mortgage lenders and the manufactured housing industry has been somewhat limited. Because the demand for locating and financing manufactured homes as real estate is growing, the partnership should work to break down the barriers to mortgage financing so that purchasers of manufactured homes are not unfairly denied access.

Similarly, many urban and suburban communities limit the availability of manufactured homes through regulatory and zoning practices. As a result, manufactured housing has evolved as a primary rural form. Under many local zoning—and ordinance—related development controls, such housing is either completely excluded because it is not considered a single-family dwelling, or it is relegated solely to manufactured home parks.

Action 23: Regulatory Review of Manufactured Homes

HUD should work in cooperation with State and local governments, private industry, and consumers to review and update its current system of regulating manufactured housing. This effort should include but not be limited to:

- Adopting a consensus-based process and streamlining procedures to promote timely updates and the development of standards to ensure that manufactured housing is both a safe and affordable form of housing.
- Reviewing the current private inspection system to ensure effective inspections.
- Promoting the availability of consumer protection that is equal to or broader than protection for other forms of single-family residences.

Action 24: State Participation in Manufactured Homes

California has led the way in the use of manufactured homes in traditional subdivisions. As a result of State legislation permitting HUD-code homes to be developed in single-family neighborhoods, there has been greater public acceptance of manufactured housing.

For example, using local redevelopment funds, the Poway Redevelopment Agency in Poway, California, developed the Haley Ranch Estates. The Haley Ranch Estates consist of 65 rental units starting at $250 a month, which is well within reach of families earning low and moderate incomes.

The partnership should improve and strengthen the role of State governments in manufactured housing. For example, partners should encourage more States to assume regulatory responsibilities, develop appropriate installation standards and inspection procedures, and evaluate the adequacy of consumer protection programs.

Action 25: Cooperative Research for Manufactured Homes

The partnership should initiate cooperative research and demonstration efforts to accelerate the development of

technologies for manufactured housing. Specifically, HUD and the manufactured home industry should:

- Evaluate new technologies for potential use in the next generation of manufactured homes to achieve efficiency, affordability, quality, and durability.
- Initiate cooperative research efforts to develop cost-effective and safe installation technologies to obtain private financing.
- Initiate education and dissemination efforts to accelerate research into innovative, efficient, and effective construction practices.

Action 26: Manufactured Home Industry Initiatives

The partnership should determine the feasibility of establishing programs to improve nationwide installation standards and enforcement and generate an industrywide consensus on warranties that offer consumers comprehensive coverage on both the manufactured home and its installation. Working together, home manufacturers, retailers, and other industry segments should:

- Provide technical assistance to State governments and encourage them to establish installation standards and corresponding enforcement programs.
- Identify and promote voluntary industry guidelines for market-driven warranties offering consumers comprehensive coverage of manufactured homes that includes installation.

Action 27: Zoning and Land Development Reform for Manufactured Homes

The partnership should identify and promote zoning and land development policies that are more conducive to manufactured housing. As part of this initiative, partners should develop model legislation for States and localities to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification. The partners also

should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

Action 28: Access to Financing for Manufactured Homes

The partnership should undertake a comprehensive program to expand the availability of financing for purchasers of manufactured homes who wish to own their homes. This program should include:

- An improved and simplified FHA financing program to replace the existing FHA Title I home modernization program.
- Simplification of the FHA 203(b) program for manufactured housing.
- Provision for adequate loans to cover installation of manufactured homes.
- Review of the technical criteria for acceptable manufactured home installation standards.
- Review of the appraisal guidelines of manufactured homes.
- Education and marketing on the availability of mortgage financing for manufactured homes.

APPENDIX B-1

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary
For Housing-Federal Housing Commissioner

September 14, 1992

Mr. Michael Mitchell
St. Clair County Zoning Board
10 Public Square
Belleville, Illinois 62220

Re: 42.131 of the St. Clair County revised Code of Ordinances

Dear Mr. Mitchell:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development (HUD). Section 42.131 of the St. Clair County revised Code of Ordinances, entitled "Special Permits For Mobile Homes," was recently brought to our attention and appears to be in conflict with the National Manufactured Housing Construction and Safety Standards Act of 1974.

In 1975, HUD issued Manufactured Home Construction and Safety Standards (the "Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Act"). Section 604(d) of the Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . ., with

> respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations (the "Regulations"), 24 C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Our understanding is that § 42.131 of the St. Clair County revised Code of Ordinances would preclude the siting of a manufactured home meeting the requirements of the Federal Standards in the County of St. Clair unless a "special use permit" is acquired. However, if the home meets the Building Officials and Code Administrators (BOCA) National Building Code, a special use permit is not required. We understand that this is

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true even if the home built to the Federal Standards is aesthetically the same as the home built to the BOCA Standards.

The Regulations, 24 C.F.R. § 3282.11(b), prohibit a State from requiring, as a condition of entry into or sale in the State, that a manufactured home which has been certified as in conformance with the Federal Standards by the application of the HUD label required by 24 C.F.R. § 3282.362(c)(2)(i) be subjected to state inspection to determine compliance with any standard covering any aspect of the manufactured home covered by the Federal Standard.

Generally, municipal ordinances regulating the location of manufactured homes have not been subject to the regu-

latory authority of the Act because such ordinances rest on the locality's right to determine proper land use. In the case of 42.131, however, St. Clair County is attempting to regulate and even exclude certain manufactured homes based solely on a construction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974. This regulation and exclusion is evident by the transcript of a March 2, 1992, hearing before the St. Clair County Zoning Board of Appeals, matter 92-9-SP, involving an application by Richard and Gail Halamicek for a special use permit. The transcript indicates that the Zoning Board denied a special permit application only because the subject dwelling was a manufactured home that only met the Federal Standards. The following is an excerpt from page 10 through 11 of the transcript:

> G. HALAMICEK: Okay. But what you are saying is it basically compare to the price a minimal amount to have this place fixed up on the inside. It will basically look the same on the outside and then I wouldn't have to go through a hearing.
>
> GEORGE: I can't answer it. The lady is an authority on the end cost, I'm sure.
>
> EDWARDS: I'm not familiar with the Fleetwood Home.
>
> G. HALAMICEK: Fairmount.
>
> EDWARDS: Fairmount. But you can buy a modular coded home and taking an average cost of industry, the maximum you're going to look at is around $2,500 more for going to a modular coded home.
>
> G. HALAMICEK: And it will look basically like this one here.
>
> EDWARDS: Aesthetically, you cannot tell the difference.

G. HALAMICEK: And I don't have to—get a permit for that?

GEORGE: You wouldn't have to be before this board.

G. HALAMICEK: It doesn't make any difference then. In other words, I can put my home out there if I put in a little bit more money and it's still going to look the same to these people?

GEORGE: Well, there's a few key words you're missing. It meets the BOCA code, which is a State accepted code.

G. HALAMICEK: But they don't know the difference between BOCA and I don't either.

GEORGE: Fact. But this Board has guidelines we have to live with. The County has guidelines. That's the guideline the County has established. If it meets the BOCA code, you do not need a permit to put it there.

Under 5 604(d) of the Act and its implementing regulations, St. Clair County cannot accept manufactured homes meeting the BOCA Standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. Since § 42.131 of the St. Clair County revised Code of Ordinances requires a manufactured home to meet the BOCA Standard or obtain a special use permit, it establishes different construction and safety requirements for manufactured homes than those prescribed under the National Manufactured Housing Construction and Safety Standards Act of 1974. Accordingly, the ordinance, to the extent that it requires standards other than the Federal Standards for manufactured homes, is preempted by the Act.

If you have any questions, please contact Gary A. Nemec, of the Office of General Counsel at (202) 708-4044.

Sincerely,

/s/ David Nimmer, Director
Office of Manufactured
Housing and
Regulatory Functions

cc: Honorable Alan J. Dixon
230 South Dearborn Street
United States Senator
Chicago, IL 60604
Attn: Lori Logan
Staff Assistant

Mr. Rick Brown
St. Clair County
Mobile/Manufactured
Homeowners
Association
523 South Illinois St.
Belleville, IL 62220

APPENDIX B-2

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary for Housing
Federal Housing Commissioner

April 19, 1993

Mr. David L. Brown
Supervisor
Building Safety Services
Pontiac Fire and Rescue
413 North Mill Street
Pontiac, Illinois, 61764-1813

Re: Pontiac Zoning Ordinances Restricting the Siting of Manufactured Homes in Areas Other than Mobile Home Parks

Dear Mr. Brown:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development (HUD). Your March 19, 1993, letter to Larry Vietti and Section Z of Pontiac's Ordinance Amending Mobile Home Park Ordinance were recently brought to our attention. A copy of your letter is enclosed.

In 1975, the Department issued the Manufactured Home Construction and Safety Standards (the "Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Act"). Section 604(d) of the Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in

> effect, no State or political subdivision of a State shall have any authority . . . to establish . . ., with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations (the "Regulations"), 24 C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Act, 42 U.S.C. § 5402(6), defines a manufactured home as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

Our understanding is that Section Z of the Pontiac, Illinois, Ordinance Amending Mobile Home Park Ordinance entitled "Allowing Mobile Homes to Be Used for Dwellings Outside of Parks is Prohibited" prohibits the siting of a manufactured home outside mobile homes parks. In practice, however, our understanding is that Pontiac will allow a manufactured home to be placed anywhere in the city if it meets the CABO One and Two Family Dwelling Code, the National Electrical Code, the State of Illinois Plumbing Code and the BOCA National Mechanical Code.

Generally, local ordinances regulating the location of manufactured homes have not been subject to the regu-

latory authority of the Act because such ordinances rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes based solely on a construction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974, the locality is without authority to do so.

Under § 604(d) of the Act and the Regulations, a locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. To the extent that local ordinances require standards other than the Federal Standards for manufactured homes, they are preempted by the Act.

Pontiac's zoning ordinances appear to preclude the siting other than in mobile home parks, of manufactured homes that only meet Federal Standards. On the other hand, Pontiac's zoning enforcement practices, as implied in your letter, place no restrictions on structures that meet the definition of a manufactured home but are built to the standards listed in that letter. Accordingly, Pontiac's zoning ordinances and zoning enforcement practices, to the extent that they require standards other than the Federal Standards for structures that meet the definition of a manufactured home, are preempted by the Act.

If you have any questions, please contact Gary A. Nemec, of the Office of General Counsel at (202) 708-4044.

Sincerely,

David Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

Enclosure

APPENDIX B-3

June 11, 1993

Mr. Larry Whaley, Chair
Osceola County Board of County
Commissioners
Room 155
Kissimmee, Florida 34741

Re: Osceola County Zoning Regulations Restricting the Siting of Manufactured Homes

Dear Mr. Whaley:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development (HUD). The Osceola County Zoning Regulations ("Osceola's Regulations") for Residential Single Family RS-1 through RS-1C Districts and the definitions, in Osceola's Regulations, for "Dwelling Unit," "Factory Built Structure," and "Manufactured Home" were recently brought to our attention.

In 1975, the Department issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Act"). Section 604(d) of the Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . . , with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Regulations"), 24 C.F.R. § 3282.11 (e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Act, 42 U.S.C. § 5402(6), defines a Manufactured Home as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

The definition for "Factory Built Structure," in Osceola's Regulations, can be interpreted to include structures that meet the Act's definition of "Manufactured Home." However, Osceola's definition of "Factory Built Structure" applies to "any structure built in conformance with the Standard Building Code . . .", but specifically states that it "does not apply to manufactured homes built to the HUD code." Moreover, a "Manufactured Home," by definition in Osceola's Regulations, must bear "a seal certifying that it is built in compliance with the Federal Manufactured Home Construction and Safety Standards of the Department of Housing and Urban Development. . . ."

It appears that the only thing that legally separates "Manufactured Homes" from "Factory Built Structures," in Osceola County, is that a "Manufactured Home" is built to the Federal Standards, and a "Factory Built Structure" is built to the Standard Building Code. Both structures can be 320 or more square feet when erected on site, both structures can be built on a permanent chassis and both structures can be transported in one or more sections, but only the "Factory Built Structure" is considered a "Dwelling Unit."

Our understanding is that Osceola's Regulations preclude the siting of a manufactured home built to the Federal Standards in RS-1 Residential Single Family Districts and only allow conditional use, after a hearing, of a manufactured home built to the Federal Standards in RS-2 through RS-1C Residential Single Family Districts. However, if the same home meets the Standard Building Code, the home is considered a "Factory Built Structure" or "Modular Home" and, thus, a "Dwelling Unit." As a "Dwelling Unit," the Standard Building Code home can be sited in any of the above residential districts without condition or the need for a hearing. We understand that this is true even if the home built to the Federal Standards is aesthetically the same as the home built to the Standard Building Code.

Generally, local ordinances regulating the location of manufactured homes have not been subject to the regulatory authority of the Act because such ordinances rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes based solely on a construction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974, the locality is without authority to do so.

Under § 604(d) of the Act and the Regulations, a locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. By excluding or restricting only manufactured homes built to the Federal Standards, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that local zoning regulations require standards other than the Federal Standards for manufactured homes, they are preempted by the Act.

Osceola County Zoning Regulations appear to preclude or at least restrict the siting of structures meeting the Act's definition of "Manufactured Home," if the structures only meet the Federal Standards. On the other hand, those regulations place no restrictions on structures that meet the Act's definition of a "Manufactured Home," but are built to the Standard Building Code. Accordingly, Osceola's Regulations, to the extent that they require standards other than the Federal Standards for manufactured homes, are preempted by the Act.

If you have any questions, please contact Gary A. Nemec, of the Office of General Counsel at (202) 708-4044.

Sincerely,

David Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

cc: Mr. Ted Garrod, Zoning Supervisor
Osceola County Zoning Department
17 South Vernon Avenue
Room 235
Kissimmee, Florida 34741

John and Donna Jacobs
1109 Minnesota
St. Cloud, Florida 34769

APPENDIX B-4

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary
For Housing-Federal Housing Commissioner

March 3, 1994

Ms. Solveig L. Smith
Zoning Administrator
Carroll County, Maryland
225 N. Center Street
Westminster, MD 21157-5194

Re: Carroll County Zoning Regulations Restricting the Siting of Manufactured Homes

Dear Ms. Smith:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development ("HUD"). The Carroll County Zoning Regulations were recently brought to our attention by the enclosed letter from Mr. Arthur L. Sauers.

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Act"). Section 604 (d) of the Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . . , with respect to any manufactured home covered, any standard regarding construction or safety applicable to the

> same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Regulations"), at 24 C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Act, 42 U.S.C. § 5402(6), defines a "Manufactured Home" as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

In a telephone conversation, Mr. Gary A. Nemec of HUD's Office of General Counsel was informed by Mr. Ralph Green of Carroll County's Bureau of Permits and Inspection that, in Carroll County a structure meeting the above definition of manufactured home must be certified by the Maryland Codes Administration and appear on a state approved list to be classified as a manufactured home and allowed to be sited outside of a mobile home park. Mr. Green indicated that to be certified, the structure must be built and inspected according to the Building Officials and Code Administrators (BOCA) National Building Code. However, Mr. Green informed Mr. Nemec that if the same structure, meeting the above definition of manufactured home, only has a HUD label and does not appear on the state approved list, it is classified as a mobile home and must be placed in a mobile home park.

Generally, local ordinances regulating the location of manufactured homes have not been subject to the regula-

tory authority of the Act because such ordinances rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes based solely on a construction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974, the locality is without authority to do so.

Under § 604(d) of the Act and the Regulations, a locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. By excluding or restricting only manufactured homes built to the Federal Standards and accepting manufactured homes built to state or local codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that local zoning regulations require standards other than the Federal Standards for manufactured homes, they are preempted by the Act.

Carroll County Zoning Regulations appear to preclude or at least restrict the siting of a structure meeting the Act's definition of "manufactured home," if the structure only meets the Federal Standards. On the other hand, those regulations place no restrictions on a structure that meets the Act's definition of "manufactured home," but is built to the state or BOCA codes. It appears that both structures can be 320 or more square feet when erected on site, both structures can be built on a permanent chassis and both structures can be transported in one or more sections, but only the owner of a manufactured home that appears on the state approved list by virtue of the structure's compliance with BOCA can be sited anywhere in Carroll County. However, the structure built in accordance with the Federal Standards is restricted to mobile home parks. We understand that this is true even if the home built to the Federal Standards is aesthetically the same as the home built to the BOCA code.

Accordingly, Carroll County's Zoning Regulations, to the extent that they require standards other than the Federal Standards for manufactured homes, are preempted by the Act.

If you have any questions, please contact Gary A. Nemec, of the Office of General Counsel at (202) 708-4044.

Sincerely,

David Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

Enclosure

cc: Arthur L. Sauers
815 East Deep Run Road
Westminster, MD 21158

APPENDIX B-5

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary
For Housing-Federal Housing Commissioner

April 15, 1994

Mr. Steve Lutz, Chairman
Louisville Board of Zoning Adjustments
531 Court Place, Suite 900
Louisville, Kentucky 40202

Re: Louisville Zoning Regulations Restricting the Siting of Manufactured Homes

Dear Mr. Lutz:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development ("HUD"). The Louisville Zoning Ordinances restricting the siting of manufactured homes were recently brought to our attention by the enclosed letter from William Friedlander.

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Act"). Section 604(d) of the Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . ., with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manu-

> factured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Regulations"), 24 C.F.R. § 3282.11 (e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Act, 42 U.S.C. § 5402(6), de fines a "Manufactured Home" as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

Mr. Friedlander's letter provided Louisville's definition for "Modular Home" established through the June 26, 1974, resolution of the Louisville and Jefferson County Board of Zoning and a March 22, 1982, clarification of that definition from the Zoning Board's attorney. (See the attachments to Mr. Friedlander's letter). Together, the definition and clarification could be interpreted to include structures that also meet the Federal definition of "Manufactured Home" except for Louisville's requirement that such a structure must "meet [] or exceed[] the applicable building, heating, plumbing and electrical codes for the City of Louisville. . . ."

Generally, local ordinances regulating the location of manufactured homes have not been subject to the regulatory authority of the Act because such ordinances rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes based solely on a con-

struction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974, the locality is without authority to do so.

Under § 604(d) of the Act and the Regulations, a locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. By excluding or restricting only manufactured homes built to the Federal Standards and accepting manufactured homes built to state or local codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that local zoning regulations require standards other than the Federal Standards for manufactured homes, they are preempted by the Act.

If the only thing that legally separates "Manufactured [mobile] Homes" from "Modular Homes," in the City of Louisville is that a "Manufactured Home" is built to the Federal Standards and a "Modular Home" is built to state or local building codes, Louisville is preempted by the Act from restricting the siting of manufactured homes. In other words, if *both* structures are 320 or more square feet when erected on site, are built on a permanent chassis, and are transported in one or more sections but only the structure that meets the state or local building codes can be sited outside a mobile home park, Louisville may be acting without authority.

If you have any questions, please contact Gary A. Nemec, of the Office of General Counsel at (202) 708-4044.

Sincerely,

David Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

Enclosure

cc: Mr. William P. Schreck, Director
Department of Inspections, Permits & Licenses
Code Enforcement Division
Louisville, KY 40202-2728

Mr. William Friedlander
2140 Bonnycastle
Louisville, KY 40202

APPENDIX B-6

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary
For Housing-Federal Housing Commissioner

October 4, 1994

Mr. Edward Strapp, Town Supervisor
Town of West Bloomfield
P.O. Box 87
West Bloomfield, NY 14585

Re: West Bloomfield Zoning Ordinances Restricting the Siting of Manufactured Homes

Dear Mr. Strapp:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development ("HUD"). The West Bloomfield Zoning Ordinances restricting the siting of manufactured homes were recently brought to our attention by Mrs. Ellen Cuthbertson. A copy of Mrs. Cuthbertson's letter is enclosed.

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Federal Act"). Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Federal Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . .,

> with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Regulations"), 25 C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Federal Act, 42 U.S.C. § 5402 (6), defines a "manufactured home" as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

West Bloomfield's Zoning Ordinances define a "mobile home" as follows:

> A residential dwelling unit designed for transportation after fabrication on streets or highways, on its own wheels or on flatbed or other trailers, and arriving at the site where it is to be occupied as a dwelling, complete and ready for occupancy except for minor and incidental unpacking and assembly operations, location on jacks or other temporary or permanent foundations, connections to utilities and the like. A travel trailer is not to be considered as a mobile home.

In a telephone conversation on September 27, 1994, Mr. Gary A. Nemec of HUD's Office of General Counsel was informed by Mr. Scott Storke, West Bloomfield's Zon-

ing Officer, that mobile homes, in general, are restricted to mobile home parks, but may be permitted on individual lots within the town's limits as (1) an agricultural convenience, (2) an interim dwelling, and (3) under special necessity. Section 10.6 of West Bloomfield's Zoning Ordinances outlines these special uses. Accordingly, if all structures meeting the definition are treated alike, West Bloomfield's definition of "mobile home" and the enforcement of its zoning regulations based on the definition would not be in conflict with the preemptive provisions of the Federal Act.

However, Mr. Storke confirmed the practices alleged in Mrs. Cuthbertson's letter that a structure meeting the town's definition of "mobile home" and the Federal Act's definition of "manufactured home" could be outside of a mobile home park without the need for a special use permit if the home met the New York State Uniform Building Code. Mr. Storke indicated that these types of structures are distinguished by the label placed on the home. A structure that meets the definition of mobile home, but has a label indicating compliance with the New York State Uniform Building Code, is considered a "modular home" and can be sited by right within the town limits. A mobile home, which is restricted to mobile home parks, has a label indicating compliance with the Federal Standards. Accordingly, it appears that in practice West Bloomfield restricts the siting of manufactured (mobile) homes based on what standards they meet.

Generally, local ordinances regulating the location of manufactured homes have not been subject to the regulatory authority of the Federal Act because such ordinances rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes through zoning that is based solely on a construction and safety code different than that prescribed by the National Manufactured Hous-

ing Construction and Safety Standards Act of 1974, the locality is without authority to do so.

Under Section 604(d) of the Federal Act and the Regulations, a locality cannot accept manufactured homes meeting different standards (New York State Uniform Building Code) and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. By excluding or restricting only manufactured homes built to the Federal Standards and accepting manufactured homes built to state or local codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that the language or enforcement of local zoning regulations require that manufactured homes meet standards other than the Federal Standards for manufactured homes, they are preempted by Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

If the only thing that legally separates a manufactured home (mobile home) from another factory-built, single-family dwelling in West Bloomfield is that the manufactured home is built to the Federal Standards and the other factory-built housing is built to New York State Uniform Building Code, West Bloomfield is preempted by the Federal Act from restricting the siting of the "HUD Code" manufactured homes. In other words, if *both* structures are 230 or more square feet when erected on site, are built on a permanent chassis, and are transported in one or more sections but only the structure that meets the New York State Uniform Building Code can be sited by right outside a mobile home park, West Bloomfield may be acting without authority.

If you have any questions, please contact Gary A. Nemec, of the Office of General Counsel, at (202) 708-4044.

Sincerely,

David Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

Enclosure

cc: Mrs. Ellen Cuthbertson
2415 Route 65
P.O. Box 26
West Bloomfield, NY 14585

APPENDIX B-7

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary
For Housing-Federal Housing Commissioner

Received April 13, 1995

Ms. Mary Buckelew
President, Jefferson County Commission
716 21st Street, North
Birmingham, AL 35263

Re: Jefferson County Zoning Ordinances Restricting the Siting of Manufactured Homes

Dear Ms. Buckelew:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U. S. Department of Housing and Urban Development ("HUD"). The Jefferson County Zoning Ordinances restricting the siting of manufactured homes in residential districts R-1 through R-4 were recently brought to our attention by the enclosed letter of Catherine R. Campbell.

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Federal Act"). Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under (the Federal Act) is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . ., with respect to any manufactured home

> covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Federal Regulations"), 24 C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Federal Act, 42 U.S.C. § 5402(6), defines a "manufactured home" as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

Section 1700.55 of Jefferson County's Zoning Ordinances defines "mobile home" as follows:

> A structure, transportable in one or more sections which is eight (8) feet or more in width and is thirty two (32) body feet or more in length, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . . .

Section 1114 of Jefferson County's Zoning Ordinances, entitled "Regulations Governing Mobile Homes," restricts the siting of mobile homes by stating the following:

> Mobile homes are prohibited in all districts within the zoning jurisdiction of Jefferson County except zones R-5(A) and R-5(B). Mobile homes, limited to personal or family use only (not for rental pur-

> poses) shall be allowed in the following zones: R-6 (Residential) and A-1 (Agriculture) upon compliance with all the following requirements. [Requirements omitted].

With the exception of size, the language used in Jefferson County's definition of mobile home is essentially the same as the Federal Act's definition of manufactured home. A structure meeting the Federal Act's definition of manufactured home also meets the County's definition of mobile home. Accordingly, the restrictions applied to mobile/manufactured homes by Section 1114 above would not conflict with the preemptive provisions of Section 604(d) of the Federal Act because, as written, all structures meeting the definition of manufactured home appear to be treated the same.

Mrs. Campbell's letter, however, indicates that she and others were informed by Jefferson County officials that only "HUD Code" manufactured homes are not allowed in R-1 through R-4 zoning districts. She was further advised by County officials that if her home had a sticker showing it met the Southern Building Code, she would have no, problem siting it. Although Jefferson County's Zoning Ordinances do not distinguish manufactured/mobile homes built to the Federal Standards from those that are built to the Southern Building Code, it appears that in the enforcement of the zoning laws County officials do.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Federal Act because such enforcement rests on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974, the lo-

cality is without authority to do so under Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

Under Section 604(d) of the Federal Act and the Federal Regulations, a locality cannot accept manufactured homes meeting different standards (Southern Building Code) and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards (HUD Code). By excluding or restricting only manufactured homes built to the Federal Standards and accepting manufactured homes built to state or local codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that the language or enforcement of local zoning regulations require that manufactured homes meet standards other than the Federal Standards for manufactured homes, they are preempted by Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

If, as indicated in Mrs. Campbell's letter, the only thing that determines the acceptability of a manufactured home in R-1 through R-4 zoning districts is whether the manufactured home meets the Southern Building Code, Jefferson County may be preempted by the Federal Act. In other words, if two structures are brought into the County and *both* structures are 320 or more square feet when erected on site, are built on a permanent chassis, and are transported in one or more sections but only the structure that meets the Southern Building Code can be sited by right in R-1 through R-4 residential districts, Jefferson County may be acting without authority.

The Department is willing to discuss this matter and to answer any questions you may have about the requirements of the National Manufactured Housing Construction and Safety Standards Act. We suggest that you contact Gary A. Nemec, of the Office of General Counsel at (202) 708-4044 for further information. Also, if you have any suggestions that will address what appears to be a conflict between the enforcement of Jefferson County's Zoning Or-

dinances and the Federal Act, you may want to discuss them with Mr. Nemec.

Sincerely,

David C. Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

Enclosure

APPENDIX B-8

April 26, 1995

Mr. Edward H. Dekarz, Jr.
Code Enforcement Officer
Town Of Marilla
Marilla, NY 14102

Re: Town of Marilla's Zoning Ordinances Restricting the Siting of Manufactured Homes

Dear Mr. Dekarz:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary for the U.S. Department of Housing and Urban Development (HUD). The Marilla's Zoning Ordinances restricting the siting of manufactured homes only to duly approved mobile home parks was brought to our attention by the enclosed letter of Mr. Bruce Keller.

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Federal Act"). Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Federal Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . ., with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Federal Regulations"), 24

C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Federal Act, 42 U.S.C. 5402 (6), defines a manufactured home as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

The definition of "mobile home" contained in Article 3, Section 1220.1 of Codes, Rules and Regulations of the State of New York ("New York Code") mirrors the definition of "manufactured home" in Section 603(6) of the Federal Act. Article 3, Section 1221.1 of the New York Code requires that mobile homes be constructed in accordance with the Federal Standards. Article 3, Section 1222.1 of the New York Code requires that "every mobile home shall have a manufacturer's label which certifies that, to the best of his knowledge and belief, the home is in compliance with all applicable Federal construction and safety standards."

Article 2, Section 1210.1(a) of the New York Code defines a "factory-manufactured home" as a structure that:

> incorporates structures or components designed for residential occupancy, constructed by a method or system of construction whereby the structure or component is wholly or in substantial part manufactured in a manufacturing facility and is intended for permanent installation on a building site.

Article 2, Section 1212.1 of the New York Code requires that "every factory-manufactured home or com-

ponent shall bear an Insignia of Approval issued by the State Fire Prevention and Building Code Council."

Excluding the references to the label or insignia that establishes the construction code to which the structure complies, a "manufactured home" under the Federal Act could be considered a "factory-manufactured home," under New York Code. If a "factory manufactured home" can be built on a permanent chassis, the only thing that would distinguish the two structures is the construction code to which each was built and the insignia evidencing that construction code.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Federal Act because such enforcement rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the National Section 604 Safety Standards Act of 1974, the locality is without authority to do so under Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

According to Mr. Keller, his home cannot be placed on a private lot because it is not a "factory-manufactured home." Article XII, Paragraph 12.4 of Marilla's Zoning Ordinances and your February 17, 1995 letter to Mr. Keller note that "mobile homes" are restricted to approved mobile home parks in the Town of Marilla. Your letter also indicates that the determination whether a structure is a "mobile home" restricted to a mobile home park or a "factory-manufactured home" allowed on private lots is based on whether the structure has the insignia of approval issued by the State Fire Prevention and Building Code Council.

Under § 604(d) of the Federal Act and the Federal Regulations, a locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards (HUD Code). By excluding or restricting only manufactured homes built to the Federal Standards and accepting manufactured homes built to state or local codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that the language or enforcement of local zoning regulations require that manufactured homes meet standards other than the Federal Standards for manufactured homes, they are preempted by Section 604(d) of the Federal Act, 42 US.C. § 5403(d).

In other words, if two structures are brought into Marilla and *both* structures are 320 or more square feet when erected on site, are built on a permanent chassis, and are transported in one or more sections but Marilla only allows the structure that has insignia of approval by the State Fire Prevention and Building Code Council to be sited outside an approved mobile home park, Marilla may be acting without authority.

The Department is willing to discuss this matter and to answer any questions you may have about the requirements of the National Manufactured Housing Construction and Safety Standards Act. We suggest that you contact Peter S. Race, of our Office of General Counsel at (202) 708-4184 for further information. Also, if you have any suggestions that will address the apparent conflict between your zoning regulations and the Federal Act, you may want to discuss them with Mr. Race.

Sincerely,

/s/ David C. Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

cc: Mr. Bruce Keller

APPENDIX B-9

June 19, 1995

Mr. Louis Holley
4851 Upper Holley Road
Holley, NY 14470

Dear Mr. Holley:

This is in response to your recent letter addressed to the Office of Manufactured Housing and Regulatory Functions, U.S. Department of Housing and Urban Development (HUD), concerning the Town of Claredon's zoning ordinances.

As discussed with Mrs. Patricia McDuffie of my staff, you have not received a written response from the Town of Claredon prohibiting the siting of your home. However, based upon several conversations between you and personnel in the Town of Claredon, you anticipate your zoning permit will be denied. Since you have received notice to vacate your residence by July 1, 1995, HUD has prepared a response that would-be applicable within the State of New York.

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Federal Act"). Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Federal Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . ., with respect to any manufactured home covered, any standards regarding construction or safety applicable to the same aspect of performance of such manu-

> factured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Federal Regulations"), 24 C.F.R. § 3282.11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

Section 603(6) of the Federal Act, 42 U.S.C. § 5402 (6), defines a manufactured home as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built an a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

The definition of "mobile home" contained in Article 3, Section 1220.1 of Codes, Rules and Regulations of the State of New York ("New York Code") mirrors the definition of "manufactured home" in Section 603(6) of the Federal Act. Article 3, Section 1221.1 of the New York Code requires that mobile homes be constructed in accordance with the Federal Standards. Article 3, Section 1222.1 of the New York Code requires that "every mobile home shall have a manufacturer's label which certifies that, to the best of his knowledge and belief, the home is in compliance with all applicable Federal construction and safety standards."

Article 2, Section 1210.1(a) of the New York Code defines a "factory-manufactured home" as a structure that:

> incorporates structures or components designed for residential occupancy, constructed by a method or system or component is wholly or in substantial part manufactured in a manufacturing facility and is intended for permanent installation on a building sight. [sic]

Article 2, Section 1212.1 of the New York Code requires that "every factory-manufactured home or component shall bear an Insignia of Approval issued by the State Fire Prevention and Building Code Council."

Excluding the references to the label or insignia that establishes the construction code to which the structure complies, a "manufactured home" under the Federal Act could be considered a "factory-manufactured home," under New York Code. If a "factory manufactured home" can be built on a permanent chassis, the only thing that would distinguish the two structures is the construction code to which each was built and the insignia evidencing that construction code.

Generally, the enforcement of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Federal Act because such enforcement rest on the locality's right to determine proper land use. However, if a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the National Manufactured Housing Construction and Safety Standards Act of 1974, the locality is without authority to do so under Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

Under § 604(d) of the Federal Act and the Federal Regulations, a locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards (HUD Code). By excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to state or local codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that the language or enforcement of local zoning regulations require that manufactured homes meet

standards other than the Federal Standards for manufactured homes, they are preempted by Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

In other words, if two structures are brought into Claredon and *both* structures are 320 or more square feet when erected on site, are built on a permanent chassis, and are transported in one or more sections but Claredon only allows the structure that has insignia of approval issued by the State Fire Prevention and Building Code Council to be sited outside an approved mobile home park, Claredon may be acting without authority.

The Department is willing to discuss this matter and to answer any questions you may have about the requirements of the National Manufactured Housing Construction and Safety Standards Act. We suggest that you contact Peter S. Race, of our Office of General Counsel at (202) 708-4184 for further information. Also, if you have any suggestions that will address the apparent conflict between your zoning regulations and the Federal Act, you may want to discuss them with Mr. Race.

Sincerely,

/s/ David C. Nimmer
Director, Office of Manufactured
Housing and Regulatory
Functions

APPENDIX B-10

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office of the Assistant Secretary for Housing
Federal Housing Commission

February 12, 1996

Mr. Charles Owen, Chair
Osceola County Board of County
Commissioners
17 South Vernon Ave.
Kissimmee, Florida 34741-5488

Re: Osceola County Zoning Regulations Restricting the Siting of Manufactured Homes

Dear Mr. Owen:

On June 11, 1993, I sent a letter to your predecessor, Larry Whaley, advising him of our concerns with the Osceola County Zoning Regulations ("Osceola's Regulations") for Residential Single Family RS-1 through RS-1C Districts. A copy of that letter is enclosed for your information and convenience.

At that time, this office, which is responsible for enforcing the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Act"), was concerned about Osceola's prohibitions on the siting of manufactured homes built to the Federal Standards in RS-1 through RS-1C Residential Single Family Districts. The same regulations appeared to place no restrictions on structures, which met the Act's definition of manufactured home, but were built to the Standard Building Code.

Our understanding is that Osceola County has continued to exclude or restrict manufactured homes built to the Federal Standards and permit manufactured homes built to the Standard Building Code. Such continued practice is unauthorized by the Act. While a locality has a right to determine proper land use and establish aesthetic standards for manufactured homes, Section 604(d) of the Act provides that "no State or political subdivision of a State shall have any authority . . . to establish . . ., with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard." 42 U.S.C. § 5403(d).

A locality cannot accept manufactured homes meeting different standards and exclude or restrict manufactured homes that are aesthetically the same but meet the Federal Standards. By excluding or restricting only manufactured homes built to the Federal Standards, the locality is establishing standards for manufactured homes different than the Federal Standards.

This letter is to advise you that Osceola's Regulations, to the extent that they continue to require standards other than the Federal Standards for manufactured homes, are preempted and unauthorized by the Act and may subject Osceola to legal action by individuals affected by such unauthorized activity.

The Department is willing to discuss this matter and to answer any questions you may have about the requirements of the Manufactured Housing Construction and Safety Standards Act. We suggest that you contact Gary A. Nemec, of our Office of General Counsel at (202) 708-4044 for further information. Also, if you have any suggestions that will address the apparent conflict between Osceola's Regulations and the Federal Act, you may want to discuss them with Mr. Nemec.

Sincerely,

David C. Nimmer, Director
Office of Manufactured Housing
and Regulatory Functions

Enclosure

cc: Mr. Phillip R. Bergelt
Spiral Enterprise of America, Inc.
P.O. Box 700265
St. Cloud, Florida 34770-0265

APPENDIX B-11

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary For Housing
Federal Housing Commission

February 28, 1996

Honorable E. Campbell, Mayor
City of Spencer
8300 N.E. 36th Street
Spencer, Oklahoma 73084

Re: City of Spencer Zoning ordinances Restricting the Siting of Manufactured Homes

Dear Mayor Campbell:

This office is responsible for enforcing the Federal Manufactured Home Construction and Safety Standards on behalf of the Secretary of Housing and Urban Development. The Zoning Ordinances for the City of Spencer were brought to our attention by the enclosed letter from the Manufactured Housing Association of Oklahoma ("MHAOK").

In 1975, HUD issued the Manufactured Home Construction and Safety Standards ("Federal Standards") pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 ("Federal Act"). Section 603(6) of the Federal Act, 42 U.S.C. § 5402(6), defines a "Manufactured Home" as:

> [A] structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent

> chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

Section 12-204(54) of Spencer's Zoning Ordinances defines "Mobile Home" as follows:

> [A] portable or mobile living unit used or designed for human occupancy on a permanent basis . . . .

Accordingly, structures meeting the Federal Act's definition of "manufactured home" would clearly fall under the broad definition of "mobile home" in Spencer's Zoning Ordinances.

Generally, the enforceemnt of a local ordinance regulating the location of manufactured homes has not been subjected to the regulatory authority of the Federal Act because such enforcement rests on the locality's right to determine proper land use. In addition, a locality is free to adopt and enforce ordinances that regulate the appearance and dimensions of manufactured homes so long as the criteria for such ordinances do not have the effect of excluding manufactured homes based on the construction and safety standards to which they were built. Such regulation of aesthetics Protects property values, preserves the character and integrity of communities and neighborhoods and assures architectural compatibility.

However, if a locality is attempting to regulate and even exclude certain manufactured homes through zoning enforcement that is based solely on a construction and safety code different than that prescribed by the Federal Act, the locality is without authority to do so under Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d), states:

> Whenever a Federal manufactured home construction and safety standard established under [the Federal Act] is in effect, no State or political subdivision of a State shall have any authority . . . to establish . . .,

> with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

In addition, the Manufactured Home Procedural and Enforcement Regulations ("Federal Regulations"), 24 C.F.R. § 3282-11(e), prohibit any State or locality from establishing and enforcing rules or taking any action that impairs the Federal superintendence of the manufactured home industry.

According to the information provided by the MHAOK, specifically the enclosed form letter used by Spencer for rezoning from an RI Residential to an R5 Mobile Home District, a "mobile home must meet all 1993 building, plumbing, mechanical and electrical codes." While it is unclear what is meant by the "1993 building, plumbing, mechanical and electrical codes," the form letter might be referring to the Building Officials and Code Administrators International ("BOCA") Basic Building Code provided for in Section 5-301 of Spencer's Building Code and Regulations.

If the reference to the 1993 codes means the BOCA Building Code, it appears that, under Spencer's Zoning Ordinances, a structure meeting the Federal Act's definition of manufactured home, because it falls within Spencer's definition of "mobile home," must comply with the BOCA Building Code to be sited within the City's limits. The same structure, if built to the Federal Standards, could not be sited.

Under Section 604(d) of the Federal Act and the Federal Regulations, a locality cannot accept manufactured homes meeting different standards, such as the BOCA Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal Standards. By excluding or restricting only

manufactured homes built to the Federal Standards and accepting manufactured homes built to other codes, the locality is establishing standards for manufactured homes different than the Federal Standards. To the extent that the language or enforcement of local zoning regulations require that manufactured homes meet standards other than the Federal Standards, they are preempted by Section 604(d) of the Federal Act, 42 U.S.C. § 5403(d).

If, as it appears from the information provided to us, the only thing that determines the acceptability of a manufactured home within the city limits of Spencer is whether the manufactured home meets the BOCA Building Code, Spencer may be preempted by the Federal Act. In other words, if two structures are brought into the City of Spencer and *both* structures are 320 or more square feet when erected on site, are built on permanent chassis, and are transported in one or more sections, but only the structure that meets the BOCA Building Code can be sited within the City's limits while the one built to the Federal Standards cannot, Spencer may be acting without authority.

However, the City of Spencer is not in conflict with the preemptive provisions of the Federal Act if, without regard to construction standards, it treats all structures that meet the Federal Act's definition of "Manufactured Home" at 42 U.S.C. § 5402(6) the same.

The Department is willing to discuss this matter and to answer any questions you may have about the requirements of the Federal Act. We suggest that you contact Gary A. Nemec, of our Office of General Counsel at (202) 708-4044 for further information. Also, if you have any suggestions that will address the apparent conflict between Spencer's Zoning Ordinances and the Federal Act, you may want to discuss them with Mr. Nemec.

Sincerely,

David R. Williamson, Director
Office of Consumer and
Regulatory Affairs

Enclosure

cc: Ms. Deanna Fields, Executive Director
Manufactured Housing Association of Oklahoma
P.O. Box 32309
Oklahoma City, OK 73123

APPENDIX B-12

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-8000

Office Of The Assistant Secretary For
Congressional And Intergovernmental Relations

March 20, 1996

Honorable Tillie K. Fowler
Member, United States House
of Representatives
Suite 204
140 S. Atlantic Avenue
Ormond Beach, FL 32176

Dear Mrs. Fowler:

Thank you for your letter of February 8, 1996, concerning your constituent, Sharon Trescott, and the difficulty she is experiencing in siting her manufactured home in the County of Volusia, Florida. As you requested, we have reviewed the County's Zoning Ordinances in further detail to determine the propriety of Volusia's actions in this matter. Our review of the ordinances indicated that the County may be acting without authority by attempting to enforce the 1994 Standard Building Code on structures that meet the definition of "manufactured home" under Section 603(6) of the National Manufactured Housing Construction and Safety Standards Act of 1974, 42 U.S.C. § 5402(6), ("Act").

Under the Act, the Secretary of Housing and Urban Development has been granted the preemptive authority to establish and enforce standards for manufactured homes. Through the Act, Congress has declared that, as long as the Secretary has established a standard for manufactured homes, no State or political subdivision of a State has

authority to establish, with respect to any manufactured home covered by the Secretary's standard, any standard regarding construction or safety applicable to the same aspect of performance that is not identical to the standard established by the Secretary. 42 U.S.C. § 5403(d).

Section 603(6) of the Act, 42 U.S.C. § 5402(6), defines a "manufactured home" as:

> A structure, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or forty body feet or more in length, or, when erected on site, is three hundred twenty or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation. . . .

If the Secretary has established a standard for such a structure, no state or political subdivision of a state can establish a different standard for that structure.

"Appendix B—Zoning Ordinance" of Section 201.00 of the Volusia County Code defines "Manufactured Dwelling" as:

> A dwelling fabricated in a manufacturing facility and bearing a seal certifying it is constructed to standards as adopted under the authority of part IV, chapter 553, Florida Statutes, and rules adopted by the Florida Department of Community Affairs under chapter 9F-1 et seq., Florida Administrative Code.

"Appendix B—Zoning Ordinance" of Section 201.00 of the Volusia County Code defines "Mobile Home Dwelling" as:

> A single-family dwelling fabricated in a manufactured facility, having a width of more than 8 feet and length of more than 40 feet, and bearing a seal certifying it is constructed either to the Federal

> Manufactured Housing Construction and Safety Standards Code or to obsolete ANSI 119.1 Mobile Home Design and Construction Standards.

Except for the standard to which it might be built, a structure, meeting the Act's definition of "manufactured home" could fall within the definition of a "Manufactured Dwelling" and within the definition of a "Mobile Home Dwelling." Nothing in Volusia's Zoning Ordinances appears to preclude a "Manufactured Dwelling" from being built on and transported by a permanent chassis and it is assumed that, if it is to comply with the Manufactured Home Construction and Safety Standards ("Federal Standards"), a "Mobile Home Dwelling" is built on a permanent chassis. Assuming that a "Manufactured Dwelling" can be built on a permanent chassis, the only thing that really distinguishes such a "Manufactured Dwelling" from a "Mobile Home Dwelling" in Volusia County is the construction standard to which it was built.

While a "Manufactured Dwelling," built on a permanent chassis, and a "Mobile Home Dwelling" may both be considered manufactured homes under the Act, it appears that Volusia County treats them differently. The January 23, 1996, letter to you from Volusia County's Attorney, Douglas M. Weaver, acknowledges that Volusia County's Zoning Ordinances do not permit a home built to the Federal Standards, like Ms. Trescott's, on property classified as RR—Rural Residential. Mr. Weaver indicates, however, that "a home meeting the standards of the 1994 Standard Building Code may be located in this [zoning] classification." Thus, the County allows Manufactured Dwellings on property zoned RR—Rural Residential because they are built to the Standard Building Code. The County prohibits Mobile Home Dwellings on the very same property because they are built to the Federal Standards. Because of this prohibition, Mr. Weaver's statement that "the County of Volusia has not created any additional construction or safety standards

in reference to HUD approved manufactured homes," is simply wrong. By restricting such homes from certain areas, the County is, in fact, imposing the Standard Building Code on *all* manufactured homes.

Congress, when it vested preemptive standard establishing authority in the Secretary under the Act, did not distinguish manufactured homes by what is "HUD approved" and what is not "HUD approved." Congress simply said that the Secretary has preemptive authority to establish standards for all structures meeting the Act's definition of "manufactured home." Volusia County appears to permit manufactured homes built to the Standard Building Code to be sited, but denies the siting of manufactured homes built to the Federal Standards. In doing so, the County is enforcing the Standard Building Code on manufactured homes. Since, the Standard Building Code is not identical to the standards established by the Secretary, the County is acting without authority.

In more general terms, if two structures are proposed to be sited in a locality and both are 320 or more square feet when erected on site, both are built on a permanent chassis, and both are transported in one or more sections, but one structure meets the local code (i.e., the Standard Building Code) and the other meets the Federal Standards, the locality must treat the structures in the same manner. If it allows the one complying with the local code to be sited, it must allow the other. If it restricts or precludes the siting of the one that meets the Federal Standards, it must do the same with the other. Not to do so would be penalizing the home built to the Federal Standards because it is not built to the local standards. Such an action is the enforcement [sic] the local satndards on manufactured homes—standards different than the Federal standards.

This general position relating to a locality's lack of authority to enforce zoning laws that impose construction

and safety standards on manufactured homes is supported by the 11th Circuit Court of Appeals in *Scurlock v. City of Lynn Haven, Florida,* 858 F.2d 1521 (11th Cir. 1988). That case involved a city that was attempting, through zoning laws, to exclude a manufactured home based solely on city's safety code. The home was constructed to the Federal Standards but the zoning ordinance required structures built to the Southern Building Code. The city's building inspector agreed that, if the home had met the Southern Building Code requirement, a permit would have been issued. The Court in *Scurlock* continued that a locality "cannot attempt land use and planning through the guise of a safety provision in an ordinance when that safety requirement is preempted by federal law." 858 F.2d at 1525.

To the extent that the language or enforcement of the County of Volusia's Zoning Ordinances requires that manufactured homes meet standards other than the Federal Standards, they are preempted by Section 604(d) of the Act, 42 U.S.C. § 5403(d). However, the County is not in conflict with the preemptive provisions of the Act if, without regard to construction standards, it treats all structures that meet the Act's definition of "Manufactured Home" at 42 U.S.C. § 5402(6) the same.

The Department is willing to discuss this matter and to answer any questions you, Ms. Trescott or Volusia County may have about the requirements of the Act. Please contact Mr. Gary A. Nemec in our Office of General Counsel at (202) 708-4044 for further information.

Sincerely,

Hal C. Decell III
Assistant Secretary

APPENDIX C

Companies that manufacture on-frame (permanent chassis) modular homes built to local codes:

Burlington Homes
P.O. Box 620 Main St.
Oxford, Maine 04270
Tel: 207-539-4406
Fax: 207-539-2900

Cavalier Homes *
P.O. Box 5003
Wichita Falls, Texas 76307
Tel: 940-723-5523
Fax: 940-766-4616

Cavco Industries
2502 W. Durango Rd.
Durango, Arizona 85009
Tel: 800-422-8264
Fax: 602-484-7028

Champion Enterprises *
Auburn Hills, Michigan
Tel: 248-340-9090

Chariot Eagle
931 N.W. 37th Ave.
Ocala, Florida 34475
Tel: 352-629-7007
Fax: 352-629-6920

Crestline Homes
5880 Crestline Rd.
Laurinburg, NC 28352
Tel: 910-276-0195
Fax: 910-276-7989

Homes of Merit *
Bldg. 121
Bartow Air Base
Bartow, Florida 33830
Tel: 941-533-0593
Fax: 941-533-0310

Horton Homes *
Eatonton, Georgia
Tel: 706-485-8506

Mascot Homes
P.O. Box 127
Grambling, South Carolina 29348
Tel: 864-472-2041
Fax: 864-472-8958

Muncy Building Enterprises
P.O. Box 325
Muncy, Pennsylvania 17756
Tel: 717-546-5444
Fax: 717-546-5903

New Era Homes
P.O. Box 269
451 Southern Ave.
Strattanville, PA 16258
Tel: 800-678-5581
Fax: 814-764-5658

R-Anell Homes
P.O. Box 428
Denver, North Carolina 28037
Tel: 704-483-5511
Fax: 704-483-5674

Ritz-Craft Corporation
P.O. Box 70
Mifflinburg, PA 17844
Tel: 717-966-1053
Fax: 717-966-3022

Schult Homes *
221 US 20 West
Middlebury, Indiana 46540
Tel: 219-825-5881
Fax: 219-825-5880

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* Denotes a member of the Louisiana Manufactured Housing Association.

Champion Enterprises
2701 University Dr., Ste. 300
Auburn Hills, Michigan 48326
Tel: 248-340-9090
Fax: 248-340-0888

Horton Homes
P.O. Drawer 4410
Eatonton, Georgia 31024
Tel: 706-485-8506
Fax: 706-485-4446

APPENDIX D

Newspaper Reviews on HUD-code Homes

Renee Elder, *Factory-Built Homes Move Up; Affordability, Luxury Features Bolster Appeal,* Tennessean, July 2, 1997, at 1E

Leon Teeboom, *Moving Up To Mobile; Real Estate: Many in O.C., for economic or lifestyle reasons, are finding manufactured housing the way to go,* Orange County Register, June 19, 1997, at C01

Shirley Armbruster, *Factory Built; An upscale manufactured home takes root in the foothills,* Fresno Bee, May 31, 1997, at E1

Robert Nusgart, *Remodeled community: New Colony Village in Elkridge features the first single-family house of its kind, a breakthrough design in manufactured homes,* Sun (Baltimore), May 25, 1997, at 1N

Linda Murphy, *Titan builds new image for homes,* Observer-Dispatch Utica, NY, May 18, 1997, at D14

Judy Wade, *Retiring To A Manufactured Home Is An Affordable Option,* News & Record (Greensboro, NC), Apr. 23, 1997.

Jeff Crider, *Home-made on the factory floor; Manufactured housing has come a long way from the trailer park. Today's models are just as spacious and fancy as site-built homes,* Press-Enterprise (Riverside, CA), Apr. 13, 1997, at G01.

Kathryn Holzka, *A New Twist on Housing,* Santa Fe New Mexican, Mar. 23, 1997, at I1

Nick Harder, *Manufactured Dreams; These homes blend in well and have all the amenities of regular houses such as drywall and fine appliances,* Orange County Register, Mar. 22, 1997, at E01

Kevin Sack, *The Nation; Mobile Homes Go Upscale: One Pet Per Plot, Please,* N.Y. Times, Feb. 23, 1997, at 3

Mike Pellegrini, *Insert Tab A Into Slot B; Factory-Built Homes Moving Into The Mainstream,* Pittsburgh Post-Gazette, Feb. 1, 1997, at D-1

Brenda Seekins, *Manufactured Dreams Tailored to buyers' needs, factory-made homes aren't just trailers anymore,* Bangor Daily News (Bangor, ME), Jan. 25, 1997

Dave Munday, *Manufactured housing industry working to change image,* Post and Courier (Charleston, SC), Jan. 20, 1997, at D10

Pamela Sherrid, *In on the ground floor,* U.S. News and World Report, Dec. 9, 1996, at 108

Ursula Miller, *Zaring's new blueprint; Known for its tony houses, the Cincinnati-based builder surprises watchers moving into manufactured homes,* Cincinnati Enquirer, Dec. 8, 1996, at I01

Cara S. Trager, *Mobile Homes Provide Path To Affordable Homeownership,* Newsday, Nov. 22, 1996, at D02

Jason Sandford, *A Search For Acceptance Manufactured Housing Makers Working To Overcome Stigmas,* Asheville Citizen-Times (Asheville, NC), Aug. 12, 1996, at A1

Scott Grusky, *Don't Fence Me In; Manufactured Homes Are No Longer Confined To Traditional Parks. Today They're Being Used On Lots In Both Urban And Rural Settings.*, L.A. Times, Aug. 11, 1996, at K1

And now for the homeburger, Economist, Aug. 10, 1996, at 19

Jim Szymanski, *Homes Fresh From The Factory; High Costs Of Traditional Houses Makes Many People See Manufactured Homes As Attractive Alternative,* News Tribune, July 7, 1996, at F1

Carlos Tejada, *Mobile homes today are more than metal walls and roofs*, Austin American-Statesman, July 5, 1996, at D1

G.K. Sharman, *An Upwardly Mobile Lifestyle; Residents Of Mobile Home Parks Can Find Affordable Housing In A Refreshingly Friendly Atmosphere*, Orlando Sentinel, Apr. 14, 1996, at 19

Elizabeth Wilkerson, *Zoning Strictures Being Challenged; Manufactured Home Industry Not Taking Impediments Lightly*, Richmond Times Dispatch, Feb. 25, 1996, at K-1

Rachel Smolkin, *Not-So-Mobile Homes*, Albuquerque Tribune, Jan. 23, 1996, at C1

Anne Carothers-Kay, *Trailer parks polish image; Mobile homes go upscale as industry reinvents itself*, Des Moines Register, Jan. 3, 1996, at 3

Glen Justice, *Manufactured Housing Finds A Home; An Old Idea With A New Look Can Cut Building Cost In Half*, Times-Picayune, Dec. 9, 1995, at R1

Ralph Bivins, *Mobile home sales are booming across Texas. More amenities and increased affordability are luring people who've never been able to buy their own homes before.*, Houston Chronicle, Nov. 19, 1995, at B1

Mark Klimek, *Mobile Homes: An Affordable Alternative; Manufactured Housing Is Better Built, Better Looking And More Comfortable Than It Was A Few Decades Ago.*, Portland Press Herald, Nov. 10, 1995, at 2F

APPENDIX E

List of Materials Lodged with the Clerk of Court

Susan Brady, *Manufactured Housing: HUD Code Homes Lead The Way in City's Redevelopment,* Professional Builder, Sept. 1993.

Building a Foundation in Manufactured Housing, America's Community Banker, Sept. 1995

Don O. Carlson, *New Colony Village, 'Most Beautiful' HUD-Code Home Project, May Also Be The Biggest Industry Breakthrough,* Automated Builder, June 1997

Manufactured Housing Institute, Community Profile, Winter 1994

Manufactured Housing Institute, Community Profile, Fall 1994

Manufactured Housing Institute, Community Profile, Winter 1995

Manufactured Housing Institute, Housing Currents, Winter 1997

APPENDIX F

Tables reprinted from the Foremost Insurance Company, *The Market Facts* (1995)

FAMILY HOUSEHOLD DESIGNATION	1981	1984	1987	1990	1993
Husband And Wife	65%	66%	62%	58%	58%
Male And Child/Other Relative	0%	1%	1%	2%	1%
Female And Child/Other Relative	6%	9%	10%	10%	10%
Male Living Alone	7%	5%	6%	9%	8%
Female Living Alone	19%	18%	18%	19%	21%
Male And Non-Relative	1%	0%	1%	1%	1%
Female And Non-Relative	2%	1%	2%	2%	1%
Total Percentage	100%	100%	100%	100%	100%
Number Responding	6,968	7,276	16,568	15,401	14,224

AGE OF HOUSEHOLD HEAD	1981	1984	1987	1990	1993
Less Than 30 Years	24%	21%	20%	10%	8%
30-39 Years	25%	23%	25%	25%	25%
40-49 Years	10%	12%	14%	18%	18%
50-59 Years	13%	12%	11%	13%	14%
60-69 Years	15%	17%	15%	17%	16%
70 Years And Over	13%	16%	15%	17%	19%
Total Percentage	100%	101%	100%	100%	100%
Number Responding	6,968	7,276	16,568	15,401	14,224
Average Age	46	47	47	50	51

WHO LIVES IN MANUFACTURED HOMES?

Employment Status of Household Head	1981	1984	1987	1990	1993
Full Time	64%	59%	59%	60%	58%
Part Time	6%	6%	7%	7%	7%
Retired	23%	26%	26%	27%	28%
Not Employed	8%	9%	8%	6%	7%
Total Percentage	101%	100%	100%	100%	100%
Number Responding	6,965	7,276	16,391	15,053	13,549

Occupation of Household Head	1981	1984	1987	1990	1993
Retired	23%	26%	26%	26%	26%
Operator/Laborer	20%	20%	18%	15%	14%
Technical/Sales/ Administrative Support	15%	12%	12%	10%	8%
Craftsman/Repairman	12%	12%	11%	13%	12%
Managerial/Professional	9%	10%	8%	12%	14%
Service	8%	8%	7%	8%	7%
Student/Armed Forces/Other	8%	9%	15%	13%	16%
Farming/Forestry/Fishing	4%	4%	3%	2%	2%
Total Percentage	99%	101%	100%	99%	99%
Number Responding	6,968	7,276	16,432	15,401	14,224

Education of Household Head	1981	1984	1987	1990	1993
Grade School	9%	8%	9%	8%	5%
Some High School	14%	16%	16%	15%	14%
High School Graduate	44%	43%	44%	42%	38%
Some College	20%	22%	22%	25%	27%
College Graduate— 2 Year Associate Degree	*	*	*	*	5%
College Graduate—4 Year Degree	7%	6%	5%	6%	7%
Post Graduate Degree	5%	5%	4%	4%	3%
Total Percentage	99%	100%	100%	100%	99%
Number Responding	6,959	7,265	16,535	15,337	14,114

* Throughout this report, an "*" will indicate that comparable data is not available from previous studies.

Marital Status	1981	1984	1987	1990	1993
Now Married	65%	66%	62%	58%	58%
Never Married	13%	9%	9%	10%	9%
Divorced/Widowed/Separated	22%	25%	29%	32%	32%
Total Percentage	100%	100%	100%	100%	99%
Number Responding	6,968	7,276	16,567	15,401	14,224

Annual Household Income	1981	1984	1987	1990	1993
Less Than $10,000	29%	27%	23%	18%	15%
$10,000-$19,999	41%	37%	35%	32%	27%
$20,000-$29,999	23%	22%	24%	26%	26%
$30,000-$39,999	5%	9%	12%	14%	17%
$40,000 And Over	2%	5%	7%	10%	15%
Total Percentage	100%	100%	101%	100%	100%
Number Responding	6,968	7,276	16,568	15,401	14,224
Median Income Level (in dollars)	$14,500	16,000	17,500	20,100	22,300

Household Size	1981	1984	1987	1990	1993
1 Member	25%	23%	24%	27%	28%
2 Members	35%	37%	34%	36%	36%
3 Members	16%	18%	18%	16%	15%
4 Members	15%	15%	15%	14%	13%
5 Or More Members	8%	7%	8%	7%	7%
Total Percentage	99%	100%	99%	100%	99%
Number Responding	6,968	7,276	16,568	15,401	14,224
Average Household Size	2.5	2.5	2.5	2.4	2.4

APPENDIX G-1

City of La Porte
Established 1892

October 6, 1993

Mrs. Jan Stevenson
230 Dwire Drive
La Porte, TX 77571

Re: Replacement of Burned Home: 230 Dwire

Dear Mrs. Stevenson,

Debbie Wilmore has informed me that you wish to replace the manufactured home that was removed from 230 Dwire. First, I would like to let you know that Mrs. Wilmore has not ignored or delayed acting on your request for information. As you know, the manufactured home at this location was a legally established nonconforming structure. Mrs. Wilmore is not completely familiar with all the Zoning Ordinance requirements that pertain to nonconforming structures. She, therefore, referred your request to me. I, in turn, contacted the City Attorney's office. I apologize for the delay and any inconvenience this may have caused.

As we discussed during the August 19, 1993, Planning and Zoning Commission meeting a pre-1976 mobile home may one time only be replaced on a lot by a manufactured home, constructed subsequent to June 15, 1976. As a prerequisite to issuing a permit to replace the home which was located at 230 Dwire, the City must ask that you submit a copy of the title of this home. Once it has been verified, by title, that the burned home was constructed prior to June 15, 1976, the City will be able to process a permit application for placement of a manufactured home.

A permit application for placement of the home must include a copy of the manufactured home title verifying construction subsequent to June 15, 1976 and a survey/ site plan indicating location of buildings and other property improvements. A copy of the City's "Residential Construction Handout" is attached. This handout contains specifications for setbacks, lot coverage, fencing, etc.

The City will do all it can to assist you in resolving this matter in a timely fashion, but before we can go forward, a copy of the title for the burned home must be submitted. Also, it must be stressed that the City can only issue a permit if the burned home was constructed prior to June 15, 1976. If the burned home was constructed subsequent to June 15, 1976, it is a manufactured home and is not eligible for replacement under the provisions of the State's Manufactured Housing Act. A manufactured home, destroyed by fire or other causes would be subject to the requirements of Zoning Ordinance Section 4-201.

While this section makes provisions for repair of damaged structures, it very clearly prohibits the total reconstruction of a destroyed nonconforming structure. If the home formerly located on this property was a manufactured home, due to the fact it has been completely demolished, it cannot be replaced; nor can the Zoning Board of Adjustment grant a variance or special exception to permit another manufactured home to be placed on the property.

Although, under these circumstances, another manufactured home may not be placed on this property, there are two alternative options which are still available. The first option is to have a home built on the property. The Bay Oaks Subdivision is in a R-1, Low Density Residential Zone. Neither zoning nor subdivision deed restrictions should present any obstacles to construction of a conventionally built single family home.

The second option would be to have a "modular home" placed on the lot. A modular home is a type of manufactured home that has been certified by the Texas Department of Labor and Standards as meeting model building code standards. Modular homes, by state law are allowed in R-1, residential zones.

As both modular and conventionally built homes are permitted in R-1 zones, there is not a time limit or deadline for making a permit application for either of these options.

Should you wish any additional information regarding either of these options, please feel free to contact my office. I can be reached at 471-5020 ext. 254.

Sincerely,

Mark S. Lewis
Chief Building Official

xc: Charles Harrington, Director of Planning
John Armstrong, Assistant City Attorney

APPENDIX G-2

City of La Porte
Established 1892

October 14, 1993

Mrs. Jan Stevenson
PO Box 385
La Porte, TX 77571

Re: 230 Dwire

Dear Mrs. Stevenson,

I received your October 12, 1993, letter. In the letter you raised two questions. In regard to the first question, you are correct. If the home which burned was manufactured on or subsequent to June 15, 1976, it cannot be replaced with a manufactured home. This determination is based on state law.

The Texas "Manufactured Housing Standards Act" defines a "mobile home" as a structure "constructed before June 15, 1976 . . ." The Act defines a "Hud-code manufactured home" as a structure "constructed on or after June 15, 1976 . . ." Article 5221f (from Vernon's Civil Statutes) states, "permits . . . must be granted by an incorporated city for the replacement of a mobile home within its corporate limits with a HUD-code manufactured home."

If the destroyed home was manufactured prior to June 15, 1976, it was, as defined by the State of Texas, a mobile home. As such, under state law, it may be replaced by a HUD-code manufactured home.

If the destroyed home was manufactured on or subsequent to June 15, 1976, it was, again, as defined by the State of Texas, a HUD-code manufactured home. As a manufactured home it would not be covered by the "re-

placement provision" of state law. It would, rather, be subject to regulation under the provisions of La Porte's Zoning Ordinance. Under these circumstances, zoning regulations (Section 4-201.3, Ordinance 1501) would not allow replacement of the destroyed home.

Please note, if the burned home was a mobile home, a permit for replacement must be submitted no later than December 27, 1993. This date is 90 days from September 18, 1993, the date on which demolition of the burned home was completed. After 90 days have elapsed, under the terms of Zoning Ordinance Section 4-202.4, use of property as a mobile/manufactured home site will be considered abandoned. Once abandoned, this use of the property cannot be resumed.

The second question dealt with replacement of the burned home with a "modular" home. I am not familiar with "Park Avenue" as a particular model or brand of home. If it is, however, certified as a modular home by the Texas Department of Labor and Standards, it will comply with the City's zoning and building code requirements. Modular homes are identified as such by title and by means of identification decals. Each section of a modular home must have an identification decal attached. The decals are mounted on the rear of the unit, usually near the tail light assembly. Modular home decals are blue. On the decal itself will be what can be described as a stylized rendition of the Texas State Star. The decal will read "Texas Department of Labor and Standards". It will also include a rather long serial number. The serial number noted on the title will match the one noted on the identification decal.

Once you have verified the home as a modular unit, please provide the City with a copy of the title. A fax copy from the manufacturer or dealership will be acceptable. The City will verify the title with the Department of Labor and Standards. Following verification, you may

submit a building permit application. The application should include a survey/site plan of the property. The home must be located on the property in a manner that complies with City setback and lot coverage requirements. These standards are noted in the "Residential Construction Handbook" that was included in the City's October 6, letter.

A building permit fee will be calculated and assessed based on valuation of the home. Valuation is calculated at $31.50 per square foot of the floor area. This is the same method of valuation used for conventionally built wood frame homes. Plumbing and electrical hookups for the home must be permitted separately. Finally, as the Zoning Ordinances lists modular homes as "Permitted" in R-1 zones, there is no time limit or date by which a modular home would have to be set on the property.

Should you have any questions regarding either of the matters discussed in this letter, please feel free to call. I can be reached at 471-5020 ext. 254.

Sincerely,

Mark S. Lewis

ML:pal

xc: Charles Harrington, Director of Planning
John Armstrong, Assistant City Attorney

Supreme Court, U.S.
FILED
SEP 8 1997
CLERK

No. 97-220

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.,
Petitioner,

v.

CITY OF LA PORTE and ZONING BOARD OF ADJUSTMENT OF THE CITY OF LA PORTE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281
Attorneys for Petitioner

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PETITIONER'S REPLY BRIEF

Petitioner herewith submits its Reply to Respondents' Brief in Opposition, as follows:

I. CONTRARY TO RESPONDENTS' ASSERTION, THIS COURT'S RECENT DECISION IN *CAMPS NEWFOUND/OWATONNA, INC. v. TOWN OF HARRISON, ME.*, 117 S.Ct. 1590 (1997), IS MATERIAL TO THIS CASE.

After accusing Petitioner of asserting that *Camps* changes the standard of review (p. 3), which it most assuredly does not, Respondents proceeded to cite *Camps* for the dubious proposition that "[t]he standards of review applicable to facially discriminatory and facially neutral legislation are substantially different" (p. 4). Respondents' position stands Commerce Clause jurisprudence on its head. Since 1979, this Court has consistently acknowledged that facially neutral legislation which nevertheless discriminates *in its practical effect* is reviewed under strict scrutiny. *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). That this Court does not focus exclusively on the language of the challenged statute in determining whether the statute discriminates is further evidenced by this Court's recent definition of actionable discrimination: "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, etc*, 511 U.S. 93, 99 (1994). On this point, Respondents are simply wrong.

Camps is material, not because it *changes* the standard of review but because it reinforces the mandate for lower courts to view skeptically any incidence of discrimination without taking into account the overall impact on the national economy. The district court in this case openly questioned whether the zoning practices of a small Texas town present grave implications for the

national economy.[1] *Camps* makes clear that the analysis adopted by the district court was philosophically misguided because the Dormant Commerce Clause concerns itself, not with the nation's economy *per se* but with national solidarity.[2] *Camps* represents the first modern pronouncement from this Court on this critical point.[3] Had the district court allowed itself to assume that a local ordinance which discriminates against the interstate commerce in HUD-code manufactured housing is to be reviewed under the same exacting standard as, say, a state statute that discriminates against interstate commerce, then it is probable that the outcome of this case would have been markedly different.

Camps is also material to this case because it clarifies the burden borne by the challenger. *Camps* holds that the challenger is not required to prove that, in fact, discrimination caused an actual shift in business from interstate commerce to an intrastate industry. 117 S.Ct. at 1601 n.15. In the context of this case, Petitioner should not have been required to show—but *was* required to show—that, in fact, a prospective purchaser of a HUD-code manufactured home had instead chosen a modular home as a result of La Porte's prohibition against the

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[1] District Judge Atlas doubted whether there was an "identifiable and statistically significant impact on interstate commerce resulting from the prohibition of manufactured homes from a segment of a single city, La Porte." (App. C, 22a).

[2] In *Camps*, this Court held that "even the smallest scale discrimination can interfere with the project of our federal Union," 117 S.Ct. at 1608, and that "there is no 'de minimis' defense to [discrimination]," *id.* at 1601 n.15.

[3] In *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994), Justice Kennedy described the national purposes served by the rule against discrimination, *id.* at 390, but there was no broad pronouncement, as there is in *Camps*, that *any* level of discrimination violates those purposes.

former.[4] If the district court and Fifth Circuit had the opportunity to follow *Camps,* the outcome would probably be significantly different, thus demonstrating the virtue of a GVR order.

II. CONTRARY TO RESPONDENTS' ASSERTION, HUD'S STATEMENT OF POLICY 1997-1, RELEASED MAY 5, 1997, IS MATERIAL TO THIS CASE.

Respondents err when they state, at 4, that "[t]he HUD policy is not material to Petitioner's preemption claim because HUD's position on preemption is consistent with the analysis of that issue by the Fifth Circuit." On the contrary, the Fifth Circuit has explicitly rejected the substance of what is now contained in HUD's Statement of Policy 1997-1.

The gist of HUD's Statement of Policy 1997-1 can be stated thusly: if two different factory-built houses meet the federal definition of "manufactured home," then a municipality cannot accord differential treatment to the houses.[5] At the district court and Fifth Circuit, Petitioner consistently argued that, because a modular home can meet the federal definition of "manufactured home," and

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[4] In *Texas Manufactured Housing Association, Inc., et al. vs. City of Nederland, et al.,* 101 F.3d 1095 (5th Cir. 1996), *cert. denied,* 117 S.Ct. 2497 (1997), upon which, as Respondents point out, the decision in this case was based, the Fifth Circuit found that Petitioner had failed to prove that would-be buyers of HUD-code manufactured housing would turn instead to modular housing, an intrastate industry. 101 F.3d at 1104.

[5] HUD's Guidelines provide that "a locality cannot accept structures meeting the Federal definition of manufactured home[] which comply with different standards, such as the local or State Building Code, and exclude or restrict manufactured homes that are aesthetically the same but only meet the Federal standards" (App. E, 61a). On the other hand, "[i]f under the local zoning laws the locality accords the same treatment to all structures that meet the Act's definition of a "Manufactured home" (42 U.S.C. 5402(6)), the locality is not in conflict with the preemptive provisions of the Act" (App. E, 70a) (Statement of Policy 1997-1).

because La Porte treats modular housing differently from HUD-code manufactured housing, La Porte is effectively imposing a different building code (*i.e.*, the Texas modular building code) on HUD-code manufactured housing in violation of 42 U.S.C. § 5403(d). Petitioner's longstanding position mirrors HUD's recent Statement of Policy, which provides that "[b]y excluding or restricting only manufactured homes built to the Federal standards and accepting manufactured homes built to State or local codes, the locality is establishing standards for manufactured homes that are different from the Federal standards" (App. E, 70a).

Contrary to Respondents' assertion, both the district court and the Fifth Circuit have previously rejected Petitioner's and, therefore, HUD's position. The district court found that, "rather than establish construction or safety standards for manufactured homes, La Porte has excluded manufactured homes from its 'R-1' districts" (App. C, 9a). The Fifth Circuit's position is that Petitioner is required to show that the exclusion of HUD-code manufactured homes is "linked" to local safety and construction standards.[6]

HUD's Guidelines and Statement of Policy are material to this case. If modular housing meets the federal definition of "manufactured home," then, because it treats modular housing (permitted) differently from HUD-code manufactured housing (excluded in R-1 districts), La Porte's zoning scheme violates 42 U.S.C. § 5403(d). Respondents' ready response at the Fifth Circuit [7] was that a modular home allegedly does not meet the federal definition of "manufactured home," which is required to be built on a permanent chassis. 42 U.S.C. § 5402(6).

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[6] *See Texas Manufactured Housing Association, Inc., et al. vs. City of Nederland, et al.*, 101 F.3d 1095, 1100 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2497 (1997).

[7] *See* Brief of Appellees, at 11.

In reality, however, many *modular* homes are also constructed with a permanent chassis.[8] These particular homes —which meet the federal definition of "manufactured home" but are constructed to the Texas modular building code—are allowed in La Porte's R-1 districts, but HUD-code manufactured homes are not. This zoning scheme violates 42 U.S.C. § 5403(d).

Respondents' final argument, at 5-6, is that HUD's Guidelines and Statement of Policy are not material to this case because they are not "binding" on the courts. Respondents' loose assertion is troublesome because, although "[t]he judiciary is the final authority on issues of statutory construction," *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837, 843 n.9 (1984), this Court has held that courts "must sustain the [agency's] approach so long as it is 'based on a permissible construction of the statute.'" *Auer v. Robbins*, 117 S.Ct. 905, 909 (1997) (quoting *Chevron*, 476 U.S. at 842-43). Lower courts would be bound by HUD's Guidelines and Statement of Policy unless they are found to be "contrary to clear congressional intent." *Chevron*, 476 U.S. at 843 n.9. If the District Court and Fifth Circuit had the opportunity to follow HUD's lead in this case, the outcome would probably be significantly different, demonstrating once again the virtue of a GVR order.

III. CONTRARY TO RESPONDENTS' ASSERTION, THIS CASE IS NOT "SUBSTANTIALLY IDENTICAL" TO THE *NEDERLAND* CASE.

Respondents place too much reliance upon the fact that certiorari was denied in *Texas Manufactured Housing Association, Inc., et al. v. City of Nederland, et al.*, 101 F.3d 1095 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 2497

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[8] As amici point out in their brief (p. 11), fourteen companies across the country produce modular housing with a permanent chassis.

(1997).[9] When Petitioner filed its petition for certiorari in the *Nederland* case (April 25, 1997), HUD had not yet published its Statement of Policy 1997-1 (May 5, 1997), and this Court had not yet handed down its decision in *Camps* (May 19, 1997), so the focus of that petition was necessarily different than the petition filed in this case.

The facts in this case also serve to distinguish the two cases. The evidentiary record in this case is stronger than in the *Nederland* case because it is vastly more objective. On the Dormant Commerce Clause claim, the Fifth Circuit in the *Nederland* case refused to compare the market for HUD-code manufactured housing with the market for modular housing, arguing that the two types of housing were not substitutes for one another. *Nederland*, 101 F.3d at 1104. On this point, Petitioner's evidence in the *Nederland* case consisted of affidavits from interested persons. In this case, however, La Porte's Chief Building Official sent a letter to a former plaintiff in this case in which he wrote that she would be permitted to replace her fire-damaged HUD-code manufactured home with a modular home.[10] He also described a modular home as a "type of manufactured home."[11] This type of damning evidence was not available in the *Nederland* case.

The *Nederland* case is also distinguishable with respect to Petitioner's federal preemption claim. In *Nederland*, the Fifth Circuit found that Petitioner did not prove that Nederland's exclusion of HUD-code manufactured homes

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[9] This Court has repeatedly cautioned that "an order denying a petition for certiorari expresses no opinion on the merits of the case." *Carpenter v. Gomez*, 116 S.Ct. 488 (1996) (memorandum of Stevens, J., respecting the denial of certiorari).

[10] Letter, Mark S. Lewis to Janet A. Stevenson, October 6, 1993 (reproduced as Appendix G-1 to the brief of amici curiae).

[11] *Id.*

was "linked" to the fact that HUD-code homes do not meet the local building code. *Nederland*, 101 F.3d at 1100. In this case, however, there is tangible evidence of "linkage" because of "position statements" made by La Porte officials. During the discovery phase of this lawsuit, La Porte's officials were asked to acknowledge that HUD-code manufactured homes are as safe as modular homes. Rather than take a neutral stance, La Porte proclaimed that modular homes are "constructed to meet more stringent safety requirements than are HUD-code homes." [12] This type of evidence, not present in the *Nederland* case, supports the notion that La Porte is promoting safety by regulating land use, the effect of which is to force manufactured housing either to meet safety standards which are different from those prescribed by the HUD code (thereby violating 42 U.S.C. § 5403(d)), or suffer exclusion.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted. Alternatively, this Court should issue a GVR order.

Respectfully submitted,

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281
Attorneys for Petitioner

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[12] *See* Respondents' answer to Interrogatory No. 16 (Exhibit M to Petitioner's Response in Opposition to Respondents' Motion for Summary Judgment).